Central Law Journal.

ST. LOUIS, MO., FEBRUARY 10, 1905.

UNCONSTITUTIONAL REGULATION OF TRADES.

The present day legislature finds itself, at each session, drawn into a vortex of ill-advised legislation proposed by self-constituted reformers, who, failing to make an impression on the world by force of their own character, attempt to thrust their opinions and ideas on their respective communities through the power of the legislature. Heretofore, legislation of this kind has had its source in the seething and ever-restless bosoms of moral reformers. Now, however, a more dangerous class of legislative tinkers has arisen,—those who attempt to regulate every trade and profession in accordance with their own ideas. The persons who comprise this class do not content themselves with the proposal of general rules, but attempt to apply the law to every detail of the business sought to be regulated. Such regulations are based on no recognized principle of public policy or of the police power, and serve only to hamper and confuse existing business relations and conditions.

We are led to make these remarks by the character of legislation construed in the recent case of *In re* Aubry, 78 Pac. Rep. 900, where the Supreme Court of the state of Washington very clearly showed its appreciation of the danger and the unconstitutional trend of legislation attempting to regulate the ordinary business relations of life. The court held, in that case, that the trade of a horseshoer was not a proper subject of regulation under the police power of the state as a business concerning and directly affecting the health, welfare, and comfort of its inhabitants; and hence that Laws 1901, p. 116, ch. 67, providing for the examination and registration of horseshoers in certain cities, was unconstitutional, as an illegitimate exercise of such power.

The act thus held to be unconstitutional provided that: "In every city affected by this act there shall be appointed a board of examiners consisting of one veterinary and two master horseshoers and two journeymen horseshoers, which shall be called 'horseshoers' board of examiners,' who shall be residents of such city, and whose duty it shall be to carry out the provisions of this act, and shall have a power to fix a standard of examinations to test the qualifications of applicants. The members of said board shall be appointed by the mayor of such city, and the term of office shall be five (5) years, except that the members of said board first appointed shall hold office for the term of one, two, three, four and five years, as designated by the mayor and until their successors shall be duly appointed. The board of examiners shall have a regular place of meeting and shall hold sessions for the purpose of examining applicants desiring to practice horseshoeing as master or journeymen horseshoers in each city affected by this act, not later than three days after applications have been presented to them, and shall grant a certificate to any person showing himself qualified to practice, and the board shall receive as compensation a fee not exceeding ten ($10) dollars from each person examined."

The respondents in this case, in seeking to justify the constitutionality of the above legislation, referred to the regulation of the medical, surgical and dental professions as identical on principle with regulation of the trade of the horseshoer. The court in the principal case answered this ridiculous argument in the following language: "No argument is needed to show that the practice of the above professions is closely related to the health and comfort and welfare of the people. In fact, it is a matter of common knowledge that the practice of medicine and surgery by unskilled parties may seriously affect or endanger the very life of individuals treated or operated upon. The exercise of the police power by the state within its proper sphere is well calculated to promote and safeguard the public welfare and subserve the best interests of society. But this power, however comprehensive it may be under our fundamental law, has its limitations. In *Re* Jacobs, 98 N. Y. 108, 110, 50 Am. Rep. 636, Earl, J., says: 'The limit of the power cannot be accurately defined, and the courts have not been able or willing definitely to circumscribe it. But the power, however broad and extensive, is not above the constitution. * * * Generally, it is for the legislature to determine what laws and regulations are needed to protect the

public health and secure the public comfort and safety, and, while its measures are calculated, intended, convenient, and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts. But they must have some relation to these ends. Under the mere guise of police regulations personal rights and private property cannot be arbitrarily invaded.' Again, in 16 Wall. 36, 87, 21 L. Ed. 394 (Slaughter-House Cases), Mr. Justice Field observes: 'All sorts of restrictions and burdens are imposed upon it (the police power), and when these are not in conflict with any constitutional prohibitions or fundamental principles they cannot be successfully assailed in a judicial tribunal. * * * But under the pretense of prescribing a police regulation the state cannot be permitted to encroach upon any of the just rights of the citizen, which the constitution intended to secure against abridgment.' It may be stated as a general principle of law that it is the province of the legislature to determine whether the conditions exist which warrant the exercise of this power, but the question what are the subjects of its exercise is clearly a judicial question. One may be deprived of his liberty, and his constitutional rights thereto may be violated, without the actual imprisonment or restraint of his person. "Liberty," in its broad sense, as understood in this country, means the right not only of freedom from actual servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work when he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. All laws, therefore, which impair or trammel these rights—which limit him in his choice of a trade or profession—are infringen ents upon his fundamental rights of liberty, which are under constitutional protection." Other cases holding the regulation of the trade of horseshoers to be unconstitutional are as follows: Bessette v. People, 193 Ill. 334; People v. Beattie (Sup.), 89 N. Y. Supp. 193.

In the case of People v. Warden of City Prison, 144 N. Y. 529, 27 L. R. A. 718, the court held that a statute passed by the New York legislature which provided for the creation of a board for the examination of plumbers, and which prohibited any person to exercise the calling of a master plumber without passing an examination before such board, was a valid exercise of the police power, for the reason that the work of plumbing is essential to the comfort and health of the inhabitants of cities. This decision was rendered by a divided court. Three members of the above court dissented. Justice Peckham, who afterwards became an associate justice of the Supreme Court of the United States, delivered a strong dissenting opinion, in which the following language occurs: "The legislature might probably provide for a sanitary inspection of plumbing work, and thus secure a kind of work, as to its system and sufficiency, which might fairly be said to tend towards the protection of the health of the general public. But the trade of the practical plumber is not one of the learned professions, nor does such a tradesman hold himself out in any manner as an expert in the science of 'sanitation,' nor is any such knowledge expected of him; and this act, when practically enforced, may or may not exact it of him."

"Assuming," says the court in the principal case, "for the purposes of the present controversy, that the proposition announced by the majority of the court in the New York case last cited is good law, still we think that there is a marked distinction between the business of plumbers and that of horseshoers in the matter of the pursuit of their respective avocations in cities. The plumber's business may concern and directly affect the health, welfare and comfort of the inhabitants who have occasion to call such services into action in the community in which he plies his vocation, while the pursuit of the trade of a horseshoer under ordinary circumstances and normal conditions would have no such effect."

We cannot but rejoice that the supreme court of Washington should have given evidence of such strong mental fibre as to have successfully resisted the encroachments of such dangerous legislation as that of the character before it for construction and that it showed itself as superior in wisdom and in knowledge of American institutions to the New York Court of Appeals in the case of People v. Warden. Our legislatures and our courts should be apprised of the fact that our constitution as well as the great concensus of American pub-

lic opinion is opposed to all sumptuary or paternalistic legislation attempting to regulate the details of purely private matters. The American citizen is jealous of the powers which he has granted to state and national legislatures and has reserved the fullest measure of liberty to himself in all matters in which the public welfare does not become paramount; and in this connection it will not be inappropriate to refer to the strong words of our federal supreme court in the case of Allgeyer v. Louisiana, 165 U. S. 589, as follows: "The word 'liberty' in the constitution. means not only the right of the citizen to be free from mere physical restraint of his person as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all of his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."

NOTES OF IMPORTANT DECISIONS.

BROKERS—COMPENSATION OF REAL ESTATE AGENT FOR SALE WHERE AN EXCHANGE OF OTHER PROPERTY FORMS PART OF THE CONSIDERATION. A real estate agent is not always able to get a cash purchaser for real estate which he is commissioned to sell, and the question sometimes arises—is he entitled to his commission on the whole consideration price where a part thereof is an exchange of other realty? This question is answered in the affirmative very emphatically by the Court of Civil Appeals of Texas, in the recent case of Ullman v. Land, 84 S. W. Rep. 294, where it was held that where a broker procured a purchaser for the land sold by taking another piece of land for a part of the price, and these terms were accepted by the vendor, the transaction is a sale entitling the broker to performance of the vendor's contract to allow him all over a specified amount that he could get for the land. The court had the following observations to make in relation to this question:

"We think the transaction amounted to a sale of appellant's land as said by Mr. Tiedeman in his work on Sales (§12): 'Although it has been sometimes held that the sale must be a transfer for money, and that every other transfer is an exchange or barter, the better opinion is that the transaction is still a sale, although the transfer is made for something else than money, provided each article is transferred at an agreed or the market value, so that the one thing is received in payment of the price of the other.' In the present case appellant's lands were valued at $1,350, and the Green lands taken in payment were valued at $1,000, while the difference was represented by notes promising money, which, under all the decisions, would be equal to money as an element of sale. This meets the criterion prescribed by the author above quoted, which is 'whether there is a fixed price, as a determination of the value at which the things are to be exchanged. If there is such a fixed price, the transaction is a sale, but, if there is not, the transaction is an exchange.' This view has been expressly adopted by the courts of this state in Thornton v. Moody, 24 S. W. Rep. 331, in an opinion by Mr. Justice Fly, in which case a writ of error was refused by the supreme court. While appellant would doubtless have had the right to decline the offer made by Green, and to have insisted upon a cash transaction, yet, having waived his right to do so, and having explicitly agreed to the terms of the offer, we think he cannot be heard to say that appellee has not complied with his contract, and is not entitled to the excess over $780 brought by the land. The principle here announced is analogous to that applied in those cases holding an owner liable to the agent for his commissions where such owner accepts a less sum than the agent has been authorized to sell for. Numerous cases of this character have arisen in this state, and the owner has usually been held liable to the agent where he accepts a purchaser procured by such agent, even though at a sum or upon terms which he would not be bound to accept under the agent's contract of employment. This is properly treated as a compliance with, and the recovery in such case is upon, the contract."

DAMAGES—CONSTRUCTION OF TERM "LIKELY" IN RELATION TO FUTURE CONSEQUENCES OF INJURY.—A recent case calls our attention to the use of the word "likely" in an instruction in an action for damages in relation to future damages, which may be expected to flow from the injuries received in contradistinction from damages which have already resulted. This question arose in the recent case of Holden v. Missouri Railroad Co., 84 S. W. Rep. 133, where the court of appeals holds that in an action for injuries an instruction that the jury might award the damages that plaintiff "will be likely to suffer in the future" was not erroneous because of the use of the word "likely." The court said:

"Defendant insists that the following clause in the instruction on the measure of damages, to-wit, 'or that he will be likely to suffer in the future by reason of said injury,' gave to the jury 'a roving commission' to assess whatever damages for future loss they might believe would, by any possibility or probability, result from the injury;

basing this contention on the word 'likely.' In Schwend v. St. Louis Transit Co. (Mo. App.), 80 S. W. Rep. 40, we held that present damages for future consequences as the result of an injury could not be recovered unless such future consequences would reasonably result from the injury, and condemned an instruction that told the jury it might assess damages for such future consequences as might result from the injury. We have followed the Schwend case in a number of other decisions rendered at this term, but not yet reported. We think the best considered cases here and elsewhere base the right to recover present damages for future consequences upon the fact that there is a reasonable certainty that such future consequences will accrue. Does the instruction under consideration confine the jury to the assessment of such damages as are reasonably certain to accrue in future from the injury complained of? The term 'likely' was construed in the case of Illinois Central Railway Co. v. Davidson, 76 Fed. Rep. 517, 22 C. C. A. 306, to mean what may be reasonably supposed, and it was said, 'Things which, under the evidence, are likely to happen, are reasonably certain to happen.' The same judicial construction was given to the term in Scott Township v. Montgomery, 95 Pa. 444, and in Curtiss v. Railroad, 20 Barb. 282. In Hardy v. Milwaukee Ry. Co., 89 Wis. 183, 61 S. W. Rep. 771, the charge allowed the jury to assess damages for pain and suffering which the plaintiff 'may endure hereafter,' and for the loss of such time 'as the evidence convinces you she will be likely to suffer hereafter.' Commenting on this instruction, the court said, 'The rule is that the alleged permanent disability, in order to be a ground for damages, must be one that is reasonably certain to result from the injury complained of;' citing White v. Milwaukee C. R. Co., 61 Wis. 536, 21 N. W. Rep. 524. In the latter case the court condemned a charge that authorized the jury to assess damages for such future loss as may accrue from the injury complained of. In Kucera v. Merrill Lumber Co., 91 Wis. 637, 65 N. W. Rep. 374, on the authority of Hardy v. Milwaukee Ry. Co., *supra*, the court held a charge erroneous that told the jury the plaintiff might recover for the pain and suffering which he was 'likely to endure in the future.' The charge in the Hardy case authorized the jury to assess damages for pain and suffering which the plaintiff may endure hereafter.' We think it was this clause in the charge the court had in mind when it said the charge was too broad in its terms. This is apparent, we think, from the fact that the case of White v. Milwaukee Ry. Co., *supra*, is cited as authority for holding the charge erroneous. If the court did not have in mind the word 'likely.' used in the second clause of the charge, then the term was not construed by the court. No reference whatever is made to the term anywhere in the opinion, nor is the term construed in the Kucera case. The charge is not discussed at all, but simply held erroneous on the authority of the White case. We think the court overlooked the first clause in the charge in the White case, and for this reason misapprehended what the court had in mind when it condemned the charge; and we conclude that Kucera v. Merrill Lumber Co., *supra*, is not authority for holding that the term 'likely,' as used in this character of instruction or charge to the jury, gives it a 'roving commission' to go into the field of conjecture to assess present damages for future consequences resulting from an injury. Among other definitions of the term 'likely' given by some of the lexicographers are the following: 'Worthy of belief.'—Webster's Dictionary. 'Reasonably expected.'—Standard Dictionary. 'As may be reasonably supposed.'—Century Dictionary. Of course, the term has other significations less definite than the foregoing, and for this reason it should not be used in an instruction to a jury when plainness and definiteness of direction are required; but we do not think the jury understood by the instruction that they were commissioned to estimate the damages irrespective of what they might believe from the evidence would reasonably result in the future from the consequences of the injury, but it did understand that the future losses for which they might assess present damages were such losses as were reasonably certain to accrue from the injury. It was in this sense the learned trial court understood the term as used in the instruction, and there is nothing in the record to induce us to believe that the jury had a different understanding. We think a fair construction of the term as used in the instruction means, and was understood by the jury to mean, such losses as were reasonably certain to accrue in the future as the result of the injury complained of."

EVIDENCE TO PROVE NEGLIGENCE OF MASTER IN EMPLOYING INCOMPETENT OR UNFIT SERVANTS.

1. *Preliminary Statement.*—We start out with an analysis extracted from an opinion of Lord Neaves.[1] Without quoting this literally, the substance of it, so far as it relates to the present inquiry, is that the fundamental principle is expressed in the Latin maxim *Culpa tenet suos auctores*, which means that the person by whose fault an injury is caused, and he alone, is legally liable. Next we come to a leading exception to this maxim which is again expressed in the Latin phrase, *respondeat superior*, under which a principal or master is held bound to respond in damages for the wrongs done by his agent or servant when acting within the scope of his agency or employment. To this princi-

[1] Leddy v. Gibson, 11 Sc. Sess. Cas. (3d Series), 304.

ple there are several counter exceptions, one of which is that the rule of *respondeat superior* does not apply as against the master in cases of an injury visited by one of his servants upon another one of his servants when engaged in the same common or general employment with the servant inflicting the injury. To this rule there are again a number of counter exceptions, one of which is that the master is so liable where, in consequence of his negligence or failure to exercise reasonable care in the employment of his servants or in continuing them in the employment, he employs or retains incompetent, habitually negligent, drunken, or otherwise unfit servants; and that such negligence of the master was the proximate cause of the injury which was visited upon the servant who brings the action —in other words, that the injury which he received resulted from the incompetency, negligence, drunkenness, and other unfitnes of the fellow servant, which would have been prevented had the master done his duty in selecting him or in discharging him on discovering his unfitness.

2. *Evidence of the Negligence, Incompetency, Drunkenness, or Other Unfitness of a Servant, from Whom the Injury Proceeds.*— This brings us to the question laid out for the present discussion, which is, the methods of proof which may be resorted to in order to prove on the one hand, or to disprove on the other, the negligence, incompetency, drunkenness, or other unfitness of the servant from whom the injury proceeds, and the knowledge of the master of such dangerous habits. A case is made out for the plaintiff upon evidence that the servant from whom the injury proceeds had *frequently shown recklessness* and unfitness, and that, notwithstanding complaint against him, he had been retained by the master until the time of the accident.[2] On the other hand, where the action proceeds upon the incompetency of a fireman in temporary charge of his locomotive, the plaintiff must prove that the fireman was so inexperienced in the management of an engine that the placing him in charge of it was not an exercise of ordinary care; that he was guilty of mismanagement of the engine by reason of his inexperience and unskillfulness; and that such mismanagement was the proximate cause of the injuries which the plaintiff sustained.[3] Evidence that one acting as *engineer* on a train to which a switchman was coupling freight cars in a switch yard, was a *fireman*, and not regularly engaged as an engineer, is not sufficient to show his incompetency as an engineer, where he is shown to have served as a fireman for a long time and to have run an engine in a switch yard on several occasions.[4] Evidence that it was generally known in the community that the servant from whose negligence or misconduct the injury proceeded had been guilty of *specific acts of negligence*, showing him to be unfit for the performance of his particular duties, has been held admissible for the purpose of showing that the employer knew or ought to have known of the acts of negligence after they had been done, and ought not to have retained him in his service.[5] Evidence that the "pit boss" who had charge of the operation of the mine in which the plaintiff was injured had ample time and opportunity to learn of the incompetency of the miner from whose negligence the injury was alleged to have proceeded, was admissible as tending to show that the defendant company had knowledge of the incompetency of such employee.[6]

The uncontradicted testimony of the foreman in charge of the construction of a telegraph line, that the erection of the telegraph polees required special skill, and that an employee from whose unskillfulness the injury was alleged to have proceeded was incompetent, has been held sufficient to establish such incompetency,[7] It is scarcely necessary to add that the *burden of proof* that

[2] Northern, etc., R. Co. v. Mares, 123 U. S. 710, 31 L. Ed. 296.

[3] Core v. Ohio River R Co., 38 W. Va. 456, 18 S. E. Rep. 596.

[4] Ohio, etc., R. Co. v. Dunn, 138 Ind. 18, 36 N. E. Rep. 702, 37 N. E. Rep. 546.

[5] Lambrecht v. Pfizer, 49 App. Div. (N. Y.) 82, 63 N. Y. Supp. 591.

[6] Cherokee, etc., Coal, etc., Co. v. Dickson, 10 Kan. App. 391, 61 Pac. Rep. 450.

[7] Postal Tel. Cable Co. v. Coote (Tex. Civ. App.), 57 S. W. Rep. 912. On the other hand, where it becomes necessary for the defendant to prove that the plaintiff had the same means of knowledge as the defendant had, of the incompetency of the fellow servant from whom the injury proceeded, the fact of such knowledge may be proved by circumstances, as in othe

proper care was not used by the defendant in the selection of a so-servant from whose lack of skill the injury proceeded, rests, as in other cases, upon the plaintiff.[8] Incompetency to perform a particular service,—*e. g.*, operate a hand car,—is sufficiently proved by showing that it requires a certain degree of training to perform that service, and that the servant in question did not have such training.[9]

3. *Whether Evidence of Unfitness at the Time of the Employment Makes Out a Prima Facie Case of Negligence Against the Master.* —But the question as to the kind or *quantum* of evidence which will sustain this burden of proof and make it a *prima facie* case is a different question. One court has held, in conformity with the maxim *res ipsa loquitur*, that the plaintiff sustains this burden of proof by showing that the servant from whom the injury proceeded, was unfit at the time of the employment for the duties devolved upon him.[10] But other courts hold that the more fact of the incompetency of the servant does not of itself prove that the master has been wanting in ordinary care in employing him;[11] and certainly this is the correct rule where nothing would indicate to the master, proceeding in the exercise of reasonable care, that the servant was not in all respects competent to fill the position to which he was assigned. It is also perfectly obvious that a master might be entrapped into employing a grossly incompetent servant, by the representations of such servant or of others that he was competent,—a thing which, no doubt, frequently happens. It has been held, in this line of thought, that, before a servant can recover in an action predicated upon this theory, he is bound to prove, not only that the fellow servant by whose negligence he was injured had previously been negligent in the discharge of his duties, but that the defendant knew of his negligence, or was negligent in not ascertaining it.[12] In dealing with this question it is necessary to keep in mind a governing principle, which is, that it is the *duty* of the master in employing a servant, to exercise reasonable care, and to make a reasonable inquiry and investigation to the end of finding out whether he is fit or unfit; so that the master will be liable for an injury to a servant brought about by the negligence of a fellow servant hired by the master in entire ignorance of his qualifications, and without any inquiry in reference thereto.[13]

cases; and it will be sufficient to prove the stated facts giving rise to the inference or presumption that he knew; but in considering whether evidence of such incompetency has come under the observation of the plaintiff, reference must be had to the fact that plaintiff's attention must to a certain extent have been engaged in the discharge of his duties. Daly v. Sang, 91 Wis. 336, 64 N. W. Rep. 997. Under a declaration alleging that, by reason of defendant's negligence in permitting the walls, roof, and supports of its mine to remain defective, and in knowingly placing an incompetent and unskilled foreman in charge thereof, and that in consequence of his lack of ordinary competency and skill, plaintiff's intestate was killed,—plaintiff was entitled to introduce evidence to prove the foreman's incompetency. Dingee v. Unrue, 98 Va. 247, 35 S. E. Rep. 794. Evidence sufficient to establish the competency of miners to inspect the roof of a mine to determine its safety and to remove loose earth or rock therefrom. Fisher v. Central Lead Co., 156 Mo. 479, 56 S. W. Rep. 1107 (evidence showed proper inspection, and verdict for plaintiff was set aside). Under allegations that the injury proceeded from the fact of an engine being put in charge of a new and incompetent engineer, to the knowledge of the defendant,—evidence on which the plaintiff was properly nonsuited,—see Barton v. Jones (Pa.), 8 Atl. Rep. 850 (no off. rep.).

[8] Southern Cotton Oil Co. v. De Vond (Tex. Civ. App.), 25 S. W. Rep. 43 (no off. rep.). Circumstances under which the evidence being in conflict as to whether the injured servant had knowledge of the incompetency of the fellow servant, or of the custom of the master to employ incompetent servants, a verdict in favor of the plaintiff was sustained. Postal Tel. Cable Co. v. Coote (Tex. Civ. App.), 57 S. W. Rep. 912. Not error for the court to make a distinction between incompetency and negligence, and to submit to the jury only the question of negligence, where the evidence was entirely directed to the manner in which the co-employee performed his work, and to the knowledge of the plaintiff and the defendant with respect thereto. Olsen v. North Pacific Lumber Co., 40 C. C. A. 427, 100 Fed. Rep. 384. State of pleadings and evidence under which it was not error for the court to modify a requested instruction purporting to define defendant's duties toward deceased, so as to include its duty with respect to the selection of a proper foreman. Dingee v. Unrue, 98 Va. 247, 35 S. E. Rep. 794.

[9] International, etc., R. Co. v. Martinez (Tex. Civ. App.), 57 S. W. Rep. 689.

[10] Crandall v. McIlrath, 24 Minn. 127; Lee v. Michigan, etc., R. Co., 87 Mich. 574, 49 N. W. Rep. 909, 48 Am. & Eng. R. Cas. 356 (servant shown to have been incompetent when employed two or three weeks before the accident—in the absence of evidence of care in his selection, no proof of master's knowledge of his incompetency necessary).

[11] Thomas v. Herrall, 18 Oreg. 546, 23 Pac. Rep. 497.

[12] Wall v. Delaware, etc., R. Co., 54 Hun (N. Y.), 454, 28 N. Y. St. Rep. 132, 7 N. Y. Supp. 709, affirmed, 125 N. Y. 727, 26 N. E. Rep. 157, 35 N. Y. St. Rep. 995.

[13] Indiana Man. Co. v. Millican, 87 Ind. 87.

4. *General Reputation of a Servant as Evidence of his Fitness or Unfitness.*—As men, in judging of the character and qualifications of other men, are often compelled to form their judgment upon the reputation which such other men have established in the community where they live, or among those with whom they have acted, and keeping in view the master's duty of finding out and knowing,—it seems reasonably to follow, that the fact that the reputation of a person seeking employment from the master, among other men engaged in the same or similar employment, with respect to his competency and fitness, was bad, will be evidence to charge the master.[14] But with respect to the question of the acceptance of the risk or the contributory negligence of the servant who is killed or injured, the rule is somewhat different; since he is under no affirmative duty of finding out and knowing the competency or fitness of the fellow servant, but is entitled to trust to the diligence of the mastes in this respect, and to presume, in the absence of evidence to the contrary, that the master has done his duty.[15] General reputation that a fellow servant is reckless is not sufficient to impute contributory negligence or acceptance of the risk to the injured servant unless such reputation is known to him.[16] On the other hand, the view has been taken that the injured servant cannot charge his master with liability merely by showing the general reputation for incompetency or unfitness of the fellow servant whose negligence caused the injury, without showing that the master *knew or ought to have known* that the servant was incompetent and unfit to perform his particular duties; that the plaintiff must establish specific acts showing incompetency or unfitness for the particular duties; that a general knowledge in the community of specific acts, is evidence tending to show the master's knowledge or opportunity for knowledge; but that evidence of the general reputation of the servant is not.[17]

5. *Evidence of Specific Acts of Negligence as Tending to Show Incompetency and Unfitness of the Fellow Servant.*—Two of the cases cited in the preceding paragraph justify the conclusion that evidence of specific acts of negligence the part of the servant committing the injury is admissible as tending to prove his incompetency or unfitness, and such is the conclusion of most of the courts.[18] Other courts, pursuing the analogy which obtains with respect to impeachment or support

[14] Texas, etc., R. Co. v. Johnson, 89 Tex. 519; 4 Am. & Eng. R. Cas. (N. S.) 441, 32 S. W. Rep. 1042; Calumet, etc., St. R. Co. v. Peters, 88 Ill. App. 112 (bad reputation for carelessness and sobriety, in connection with evidence of specific acts of recklessness, sufficient to take the question to the jury).

[15] Texas, etc., R. Co. v. Johnson, 89 Tex. 519, 4 Am. & Eng. R. Cas. (N. S.) 441, 35 S. W. Rep. 1042; Calumet, etc., St. R. Co. v. Peters, 88 Ill. App. 112.

[16] Texas. etc., R. Co. v. Johnson, 90 Tex. 304, 38 S. W. Rep. 520; denying writ of error from Court of Civil Appeals, 37 S. W. Rep. 974; which decision was directed by the supreme court, 89 Tex. 519, 35 S. W. Rep. 1042; reversing (Tex. Civ. App.), 34 S. W. Rep. 186.

[17] Lambrecht v. Pfizer, 49 App. Div. (N. Y.) 82, 63 N. Y. Supp. 591, 97 N. Y. St. Rep. 591. This decision is believed to be untenable. Evidence of a bad reputation for recklessness in blasting held sufficient to affirm a judgment for damages recovered by the parents of a son killed through the negligence of such servant in failing to notify the deceased that a blast was about to be fired. Stasch v. Cornwall Ore Bank Co., 19 Pa. Sup. Ct. 113.

[18] Gier v. Los Angeles, etc., R. Co., 108 Cal. 129, 41 Pac. Rep. 22 (specific acts to establish fact of unfitness, which must be shown in addition to reputation for unfitness); Consolidated Coal Co. v. Seniger, 179 Ill. 370, 53 N. E. Rep. 733; affirming 79 Ill. App. 456 (specific act inadmissible; but evidence tending to show that a servant habitually performs his work in a manner dangerous to safety of other servants is admissible); Pittsburgh, etc., R. Co. v. Ruby, 38 Ind. 294, 10 Am. Rep. 111 (specific acts which were known or should have been known to the employer); Couch v. Watson Coal Co., 46 Iowa, 17 (same holding); Grube v. Missouri Pac. R. Co., 98 Mo. 330, 4 L. R. A. 776, 11 S. W. Rep. 736 (specific acts with evidence of knowledge thereof by master); Baulec v. New York, etc., R. Co., 59 N. Y. 356, 17 Am. St. Rep. 325 (specific act from the manner of its performance or from the circumstances, may prove unfitness); Wood v. New York, etc., R. Co., 32 App. Div. (N. Y.) 606, 53 N. Y. Supp. 162, 87 N. Y. St. Rep. 162 (evidence was sufficient to establish a switchman's frequent neglect of duty, and that the defendant knew or ought to have known of the fact); Baird v. New York, etc., R. Co., 64 App. Div. (N. Y.) 14, 71 N. Y. Supp. 734 (railroad brakeman guilty of repeated negligence, etc.); Wabash, etc., R. Co. v. Brown, 31 U. S. App. 192, 65 Fed. Rep. 941, 13 C. C. A. 222 (switch misplaced by drunken switchman, who had made same mistake a few weeks before, while in same condition, to company's knowledge); Baltimore, etc., R. Co. v. Camp, 31 U. S. App. 213, 65 Fed. Rep. 952, 13 C. C. A. 233 (evidence admissible that operator, a few months before, had gone to sleep while on duty and stopped a train, for which he had been suspended); Thomas v. Cincinnati, etc., R. Co., 97 Fed. Rep. 245 (recklessness in handling a switch engine in a particular instance does not prove incompetency).

of character in original cases, hold that evidence of specific negligence is not admissible.[19] For stronger reasons, the courts which take this view hold that a single act of negligence on the part of a servant does not necessarily charge the master with notice of the servant's incompetency so as to disable the master from defending an action brought by another servant for an injury visited upon him by the negligence of the former servant, nor does a single exceptional act of negligence on the part of a servant prove him to be negligent of incapable; but, to have this effect, the negligence must be habitual and not occasional.[20] Under any theory of this question, proof or a single previous similar act of negligence on the part of the servant doing the injury will not render the master liable, in the absence of evidence that the master had notice of the previous accident,[21] or was culpably ignorant of it.[22]

6. *Various Evidentiary Facts Tending to Prove Incompetency or Unfitness.* — In one case the plaintiff was injured by an elevator operated by a fellow servant, who was forty-one years old, of no previous acquaintance with elevators and machinery, and who had been operating the elevators in the building where the accident occurred, about twelve days, after practicing for two evenings before he was employed. His experience had been in the evening, when the travel was light. He had never operated the elevator in question until the evening of the accident. It was heavier and quicker in motion than the others and more difficult to control. There was evidence that a man fairly well qualified to run the others might be incompetent when placed in charge of this. The employer was advised by the engineer that the man would be qualified for the work with a little instruction and practice, but he made no inquiries as to how well he was instructed before being allowed to commence operating the elevator. It was held that the question of care on the part of the master in the selection of the fellow servant, and consequent liability for his negligence, was for the jury.[23] In another case, which was an action to recover damages for injuries sustained by a brakeman on an engine engaged in drawing coal from a mine, where the engine dashed into a door which was not opened at the customary signal by reason of the alleged incompetency of the doorkeeper, who was a boy or fourteen and a half years of age, it was held that the jury might consider, as going to his competency and the care exercised by the company, the boy's size, age, previous experience, strength, and intelligence, and the fact that he was kept at his post thirteen

[19] Kennedy v. Spring, 160 Mass. 203, 35 N. E. Rep. 779 (specific acts of negligence not admissible); Olsen v. Andrews, 168 Mass. 261, 47 N. E. Rep. 90 (specific acts inadmissible; but when conduct tending to show servant's qualifications, or his mental or physical fitness or unfitness for his work, is properly before the jury on one of the issues, they may consider it on the question of his competency; not competent on subject of employer's negligence in hiring him, however, without independent proof that employer ought to have discovered his incompetency); Frazier v. Pennsylvania R. Co., 38 Pa. St. 104, 80 Am. Dec. 468 ("character for care, skill and truth of witnesses, parties or others, must all alike be proved by evidence of general reputation, and not of special acts"); Galveston, etc., R. Co. v. Davis, 92 Tex. 372, 43 S. W. Rep. 570; Spring Valley Coal Co. v. Patting, 86 Fed. Rep. 433, 58 U. S. App. 575, 30 C. C. A. 168 (proof of the single act of negligence causing the accident is insufficient to take a case to the jury on the question of the competency of an employee).

[20] Baltimore Elevator Co. v. Neal, 65 Md. 438; Ohio, etc., R. Co. v. Dunn, 138 Ind. 18, 36 N. E. Rep. 702, 37 N. E. Rep. 546 (one act of negligence on his part would not raise presumption of incompetency as against the presumption that the company had exercised due care in hiring him).

[21] Mulhern v. Lehigh Valley Coal Co., 161 Pa. St. 270, 28 Atl. Rep. 1087.

[22] Huffman v. Chicago, etc., R. Co., 78 Mo. 50 (must be shown that master knew of specific acts of carelessness testified to, or was culpably ignorant thereof). It has been held that the mere fact that an employee held a stick of frozen dualin over a fire to thaw, it will not support an action at common law by a fellow employee against the master for personal injuries resulting from an explosion, upon the theory that the act itself showed that the employee was an unsuitable person for the master to have in his employment, where he was employed merely as a common laborer, and not to handle or use explosives, and was acting at the same time in pursuance of a direction for which the master was not responsible, given by a workman who was merely acting as foreman in the absence of the superintendent,—both the workman who gave the order and the workman who executed it being fellow servants with the plaintiff. McManus v. Staples, 171 Mass. 150, 50 N. E. Rep. 537. Proof that five years before the accident under investigation, a person had been injured through the negligence of the servant whose negligence was alleged to have caused the injury, and that on three other occasions during the five years, persons working with him had come near being injured, was held insufficient to impute a knowledge of his negligent character to his employer. Olsen v. North Pacific Lumber Co., 106 Fed. Rep. 298.

[23] Nutzmann v. Germania Life Ins. Co., 78 Minn. 504, 81 N. W. Rep. 518, on second appeal, 82 Minn. 116, 84 N. W. Rep. 730.

hours a day, although the statute permits the employment of boys of such age in mines, and the difficulty of opening the door, owing to heavy pressure of air against it, which was increased whenever a train approached.[24]

7. *Evidence from which Incompetency or Unfitness of Fellow Servant Cannot be Inferred.*—It has been held that the fact of incompetency or unfitness of a fellow servant cannot be inferred from the mere statement that the fellow servant was incompetent, where no facts are stated showing his incompetency;[25] nor, in case of an injury by an inmate of an insane asylum, detailed by the superintendent to assist in tearing down some brick walls, by causing one of the walls to fall, injuring another inmate, from the mere fact of insanity,—there being no evidence that the superintendent was negligent in selecting the subordinate officer who detailed the inmates to assist at the work, nor that the inmates who worked with the plaintiff were dangerous or unwilling, nor that they were unskillfully selected, nor that the accident happened through any incompetency of the officer or of the inmates;[26] nor where an engineer of a mining company has been employed by such company for more than twelve years, much of the time as an engineer, during all of which period no one has been injured by his negligence, although he once failed to reverse the lever of his engine while employed at another kind of hoist than that in which he is at present employed, and during all the time he has answered signal-bells constantly, without making any other mistakes, until the time of the present accident, and is sober and industrious;[27] nor, from the mere fact that a railroad engineer is nearsighted, that he is an improper person for the duty; because if, by the use of proper glasses, he can see sufficiently well to enable him to discharge all the duties devolving upon an engineer in operating an engine, and he in fact uses such glasses, the company would not be considered negligent on that account by retaining him in its service;[28] nor, where the issue was whether a railway company was negligent in retaining in its employ a brakeman who was careless, from evidence that he was slow and lazy, and that the company knew this;[29] nor from evidence that the yardmaster of one railroad company, who was a man short, employed a switchman on the statement of the yardmaster of another company that he had one that he was done with, and whom the former yardmaster could have, about an hour before an accident to a fellow servant occasioned in part by the negligence of such switchman.[30]

SEYMOUR D. THOMPSON.

New York.

[24] Carlson v. Wilkeson Coal, etc., Co., 19 Wash. 473, 53 Pac. Rep. 725. See also Houston, etc., R. Co. v. Patton (Tex.), 9 S. W. Rep. 175 (no off. rep., evidence to charge railway company with notice of the incompetency of a locomotive engineer.)

[25] Snodgrass v. Carnegie Steel Co., 173 Pa. St. 228, 37 W. N. C. (Pa.) 544, 33 Atl. Rep. 1104, 27 Pitts. L. J. (N. S.) 37.

[26] Atkinson v. Clark, 132 Cal. 476, 64 Pac. Rep. 769.

[27] McKeever v. Homestake Min. Co., 10 S. Dak. 599, 74 N. W. Rep. 1053.

[28] Texas, etc., R. Co. v. Harrington, 62 Tex. 597.

[29] Corson v. Maine Cent. R. Co., 76 Me. 244, (the same witness that testified he was slow and lazy, also testified that "he was careful about his work.")

[30] Ohio, etc., R. Co. v. Dunn, 138 Ind. 18, 36 N. E. Rep. 702, 37 N. E. Rep. 546. In an action by an administrator to recover damages from a railroad company for the killing of H, a fireman, through B's misplacing a switch, B being alleged to be an incompetent switchman, evidence that B had for three months preceding the accident performed the duties without fault or neglect, and was of ordinary intelligence, was held to warrant a finding that he was competent; and his neglect to close the switch being through inattention while conversing, and not through inability to perform his duties, plaintiff could not recover for the results of the co-servant's negligence; and this though, at the time of transferring B to this duty, the company had left only three employees, including B, to perform the work previously assigned to six, having discharged the others,—this fact not contributing to the accident. Harvey v. New York, etc., R. Co., 88 N. Y. 481, 25 Hun (N. Y.), 62. A finding in an action for personal injuries to an employee that a fellow servant was incompetent, that he was retained by defendant after notice of such incompetency an unreasonable length of time, and that the accident was caused by his suddenly opening a surface blow-off valve of the boilers under plaintiff's supervision,—is not a sufficient finding that defendant's retention of the incompetent employee was the proximate cause of the injury; because that might all be true, and yet the bursting of the glass from such a cause might be such an extraordinary occurrence that it would not follow that, under the circumstances, it reasonably should have been foreseen. The fact of proximate cause was not found by the jury, and the court erred in not submitting a question calling for this essential finding. Maitland v. Gilbert Paper Co., 97 Wis. 476, 72 N. W Rep. 1124.

ATTORNEY AND CLIENT — STATUTORY LIENS —PRIVATE SETTLEMENT.

YONGE v. ST. LOUIS TRANSIT CO.

St. Louis Court of Appeals, Missouri, December 13, 1904.

Sess. Acts 1901, p. 46, § 2, declares that it shall be lawful for an attorney in all actions or proposed actions to contract with his client for a percentage of the proceeds of any settlement, etc., and on notice in writing to defendants, or proposed defendants, thereof, said agreement shall operate from the service of the notice as a lien on the claim or cause of action and on the proceeds of any settlement, and cannot be affected by any settlement between the parties. Held that, where an action was brought against a defendant to enforce an attorney's lien and to recover his proportion of a private settlement under such section, it was not necessary to plaintiff's recovery that there should have been a verdict, report, decision, or judgment in his client's favor.

GOODE, J.: A car belonging to the St. Louis Transit Company ran over and killed Frank Hagan, at that time the husband of Annie Hagan. The accident occurred March 1, 1902, on Pine street in the city of St. Louis. The widow entered into a written contract with plaintiff, Yonge, June 10, 1902, by which she employed him to prosecute her claim for damages for the death of her husband against the United Railways Company and the St. Louis Transit Company. The contract contains, among other clauses these:

"Now, therefore, in consideration of the agreement of said party of the second part to prosecute said action for damages to final judgment against the said United Railways Company and St. Louis Transit Company, the said party of the first part hereby agrees to pay to him as full compensation for such services, thirty-three and one-third per cent of all money that shall be recovered in said cause, either by a compromise of the same before judgment or after a final judgment shall have been obtained against the said United Railways Company and St. Louis Transit Co. Yonge filed suit in the name of Mrs. Hagan against the two companies June 11, 1902."

On August 21, 1902, Mrs. Hagan entered into a written stipulation with the two companies who were defendants in her damage suit, as follows: "The above named plaintiff hereby acknowledges that the above stated cause has been fully settled, and hereby authorizes the dismissal of said cause at the cost of the plaintiff."

The defendants paid Mrs. Hagan $900 in settlement of her case, and it was dismissed pursuant to the stipulation. Afterwards Yonge brought the present suit against the two companies to recover one-third of the sum they had paid Mrs. Hagan, founding his action on his contract and the statutory provisions for securing and enforcing attorneys' liens arising out of contract. The petition stated the facts substantially as we have given them. The answer was a general denial. The court found for the defendant. This statute is in force in Missouri, and was when Yonge contracted with Mrs. Hagan. The learned circuit judge found against the plaintiff's case on the ground that, so far as appeared, Mrs. Hagan was solvent, and could compensate him for whatever services he had rendered.

The statute we have quoted makes no exception to the right of an attorney to enjoy and enforce a lien, in a case like this, on the ground of the solvency of his client. The action instituted by Yonge in Mrs. Hagan's name, and pursuant to his contract with her, was one *ex delicto* for damages for the death of her husband. The statute says that in such an action, as well as one *ex contractu*, it is lawful for an attorney, either before the action is brought or afterwards, to contract with his client for a certain portion of any settlement of the client's cause of action as compensation for the services the attorney may render. It says, further, that the contract may be for a portion of the proceeds of a settlement made either before the institution of an action or at any time after it is instituted. Yonge's contract with Mrs. Hagan was taken before the institution of her action, and was within the words of the statute. It is further provided that if notice is served on the defendant or defendants in the action by an attorney, stating that he has such an agreement with his client, and stating his interest in the claim or cause of action, the agreement shall operate as a lien, from the date of service of notice on the claim or cause of action, and on the proceeds of any settlement thereof, for such attorney's portion or percentage, and that this shall be so against an actual defendant or a proposed defendant. It is further provided that any settlement between the adversary parties, whether the settlement is made before the action is brought or before or after a judgment, shall not affect the attorney's lien. Further, that a defendant or proposed defendant, who in any manner shall settle any claim or cause of action with a client after service of notice by an attorney, of a contract entitling him (the attorney) to a lien shall be liable to the attorney for his lien on the proceeds of the settlement, according to the contract between the attorney and the client, if the settlement is made without the written consent of the attorney. Those provisions are quite comprehensive. They indicate a purpose on the part of the legislature to prevent a defendant, actual or potential, in an action sounding either in contract or tort, from settling with the claimant so as to cut out the claimant's attorney from a contingent compensation to which the attorney is entitled under a contract. We see no reason why Yonge was not within the protection of this statute. He had a contract with Mrs. Hagan which stated definitely what percentage of any sum collected under it, with or without suit, should be his. The defendants had notice of that contract, and settled with Mrs. Hagan in disregard of it. According to the plain language

of the statute, they could only make a settlement with her which would be binding on Yonge and exonerate them from liability to him, by first obtaining his written consent. The statute says, in effect, that if a settlement was made without his written consent, as it was, the company is liable to him for his portion of the proceeds.

Two or three propositions are advanced on this appeal by way of defense to the action. The first one is that the attorney's lien provided for by statute does not attach to the claim or subject-matter in dispute until there is a verdict or judgment in favor of the attorney's client. That argument might be good if this action were founded on the first section of the statute, but it is not. It is founded on the second section, wherein the attorney's lien, and his right to its enforcement, is made to depend on a contract with his client and timely notice of the contract to his client's adversaries. The two sections of the statute are different in their scope and intention. This suit was well brought on the second section, as the facts fit that one and bring plaintiff's cause of action with its remedial efficacy. To say that Yonge had no lien which fastened on the claim Mrs. Hagan had employed him to prosecute, until there was "a verdict, report, decision, or judgment" in her favor, would be to abrogate the second section of the statute, and wipe out all those terms in it providing that an attorney's lien shall be good on the proceeds of any settlement made, not only before judgment, but before suit is brought. If the lien is not good until there is a judgment, what becomes of the clause which declares it good and binding from the date of notice to the defendant on any proceeds thereafter realized by settling the claim? The lien to be endorsed in this case is no general retaining lien of an attorney or special common-law lien on a judgment recovered for a client. It is a statutory lien of new creation and derives its features from the language of the creating statute.

The second proposition which the defendants invoke is that Yonge should have sought to proceed with the case of Mrs. Hagan against the Transit and United Railways Companies notwithstanding the settlement; should have interposed against the dismissal of that suit, and carried it forward to a judgment for the amount of his demand. The statute in hand says in plain words that a defendant who settles with a claimant under the circumstances given shall be liable to the attorney for that percentage of the proceeds which his contract with his client entitled him to receive. An express statutory liability of a legal character was thereby created, and, as no particular nor exclusive remedy was provided for its enforcement, it is enforceable by the usual common-law remedy; that is, by an action at law, corresponding to trespass on the case. See Sedgwick, Stat. & Const. Law (2d Ed.) p. 74 *et seq.*, and the cases cited in the footnotes. The construction contended for by the defendants is clearly inadmissible, in view of the provision that, if a settlement occurs before an action is begun on the claim, the defendant is nevertheless liable. Of course, in such an instance, the attorney cannot go on with the prosecution of a suit in the name of his client, because there will be no suit pending for him to carry forward. In that contingency, unquestionably, an independent action can be instituted in his own name, and we discern nothing in the language of the statute which discriminates that contingency from one like the present, for the purpose of compelling the adoption of different procedures in the two cases. So far as the enforcement of this lien is concerned, it strikes us as resembling the statutory lien on crops, which a landlord may make effective by suing one who purchases the crops on demised premises from the tenant with knowledge of the landlord's lien. Rev. St. 1899, § 4123.

We are cited to decisions from outside jurisdictions—Georgia, Wisconsin and New York. The statutes construed in those cases are unlike ours, and the decisions are not in point as to the remedy to be pursued in enforcing our statute, though the tone of opinion running through most of them is favorable to the plaintiff's right under his contract. Twiggs v. Chambers, 56 Ga. 279; Coleman v. Ryan, 58 Ga. 132; Rodgers v. Furse, 83 Ga. 115, 9 S. E. Rep. 669; Swift v. Register, 97 Ga. 446, 25 S. E. Rep. 815; O'Brien v. Ry. (Sup.), 50 N. Y. Supp. 159; Herman v. Ry. (C. C.), 121 Fed. Rep. 185; Smelker v. Ry., 106 Wis. 135, 81 N. W. Rep. 994. The Wisconsin statute gives a lien on the cause of action, and provides that the settlement of the action after notice of the lien shall not be valid as against the lien. This was construed by the Supreme Court of Wisconsin to prevent a settlement of an action, and to permit the attorney for the plaintiff to continue the same cause of action despite the settlement. That statute contained no expressions making the settling defendant distinctly liable to the attorney. The Georgia statute gives an attorney a lien on suits, judgments, and decrees for money, and says no person shall satisfy a suit until the lien of the plaintiff's attorney for fees is satisfied George Code 1882, § 1989. That language obviously makes the security of an attorney's lien dependent on the judgment, and attaches it to the judgment. The New York statute gives an attorney a lien only from the commencement of an action, and his lien is upon the cause of action, attaching to a verdict, report, decision, or final order in his client's favor. That statute is substantially like the first section of ours, but lacks the provisions of the second section. It was held in O'Brien v. Railroad, *supra*, in construing the New York statute, that a defendant might plead a release by the plaintiff, but the release would not affect the attorney's rights, and he could continue the prosecution of the action in his own

name if he wished. Whether he could bring an independent action was not, decided, but the New York Code seems to give that right. Tracy's Code of Civil Procedure, § 66. The plain language of our statute, making a party who settles a claim against him, in contravention of the right of an attorney to a percentage of the proceeds of the claim, liable to the attorney whether the settlement occur before or after suit, leaves no question in our minds that the liability is one which the attorney may enforce by an action. The statute says "shall be liable to such attorney." As said above, when a distinct liability is created in favor of a party by a statute, such party has a remedy by action in his own name to enforce the liability, if there is no special remedy provided by the statute. It is contended that the plaintiff was bound to prove in this case that Mrs. Hagan's cause of action in the case against the Transit Company and the United Railways Company was meritorious and entitled her to a verdict; that, unless this could be and was shown, he had no right to recover, as his lien depended on the validity of her case. Looking again to the text of our statute, we find language which is incompatible with this interpretation. The attorney's lien attaches to a "claim 'or' cause of action," not to the latter alone; and remains good against a defendant who settles a "claim, cause of action, or action at law," either before or after litigation, without the attorney's written consent. In Wisconsin the statute, as we have pointed out above, attaches the attorney's lien to and makes it depend on the existence of his client's cause of action. It is therefore held that an adjustment of the cause of action by accord and satisfaction operates in extinguishment of the lien, which cannot thereafter be the foundation of a separate suit by the attorney. To prevent the lien from being defeated in this manner, attorneys are allowed to proceed with their client's case despite the adjustment, which, as to them, is a nullity. In Smelker v. R. R., *supra*, it was said the statute, by a specific provision, preserves the lien in favor of an attorney in the action he had commenced, and for that reason he might prosecute such action to a final judgment for his fees, despite a settlement. Our statute contemplates a different procedure, or at least, an additional one; for it says that if a settlement occurs without an attorney's consent, when, by virtue of a contract, he has a lien on the matter in dispute, the settling defendant shall be liable to him. This appears to allow the right of settlement, so far as the pending claim or action goes, with or without the attorney's consent; but if it is exerised without his consent, a liability to him for his percentage of the proceeds arises, and may be enforced against the defendant.

Judgment reversed and cause remanded with instructions to the lower court to proceed in accordance with the law as stated in this opinion.

NOTE.—*How Far an Attorney's Lien for Compensation Protects Him from Private Settlement Before Judgment Between His Client and the Adverse Party.*—Although the common law did not recognize an attorney's lien for compensation for his services, statutes or judicial legislation in almost every state has brought about such recognition. In the principal case we have a phase of this question which is of considerable importance to attorneys,—how far an attorney's lien for compensation for his services will protect him from a private settlement of the cause of action between his client and the adverse party.

The rule might be generally stated as follows: In the absence of fraud or inability to pay his attorney's fees, a plaintiff may settle his cause of action out of court before judgment, without providing for the payment of such fees, and in such case the attorney is not entitled to continue the action merely for the purpose of perfecting his own lien on the judgment. Pitcher v. Robertson, 66 Hun, 632, 21 N. Y. Supp. 66; Whittaker v. Clarke, 53 Tex. 647; Connor v. Boyd, 73 Ala. 385; Green v. Express Co., 39 Ga. 20; Bellamy v. Connolly, 15 Ont. Pr. 87; Kusterer v. Beaver Dam, 56 Wis. 471, 14 N. W. Rep. 617; De Graffenreid v. Railroad Co., 66 Ark. 260, 50 S. W. Rep. 272; Averill v. Longfellow, 66 Me. 237; Sheedy v. McMurtry, 44 Neb. 499, 63 N. W. Rep. 21; Miller v. Newell, 20 S. Car. 123; Ellwood v. Willson, 21 Iowa, 523; Wright v. Hake, 38 Mich. 525; Heister v. Mount, 17 N. J. L. 438; Mosely v. Jamison, 71 Miss. 456, 14 So. Rep. 529; Koons v. Beach, 147 Ind. 137, 45 N. E. Rep. 601.

There is an exception to the rule just stated which must be strictly regarded in making a settlement in the absence of plaintiff's counsel and without providing for proper compensation for the latter services. That rule is that a settlement between the parties to a suit with a view to defraud the attorney out of his fees will not discharge the defendant from liability to pay them. McDonald v. Napier, 14 Ga. 89; Young v. Dearborn, 27 N. H. 324; Courtney v. McGavock, 23 Wis. 619; North Chicago, etc., R. R. v. Ackley, 58 Ill. App. 572; Hubble v. Dunlap, 19 Ky. L. Rep. 656, 41 S. W. Rep. 432; McBratney v. Railroad, 87 N. Y. 467. Thus a proctor in admiralty may recover costs from the respondent after a private settlement with his client. The Victory, 1 Blatch. 443, Fed. Cas. No. 16937. See also to same effect,—North Chicago Street Railway Co. v. Ackley, 58 Ill. App. 572, where a person having a cause of action against a railroad company for personal injuries, contracted with an attorney to prosecute a suit for the same for a contingent fee of one-half of the amount of the recovery, and agreed to assign one-half of the judgment when recovered. During the absence of the attorney from the court, the railroad company, with knowledge of the contract existing between the plaintiff and the attorney, compromised the action by allowing judgment for a sum certain to be entered against it, and satisfied the same by paying the full amount to the plaintiff. The plaintiff having failed to pay the attorney, and being insolvent, the attorney brought suit against the railroad company for an amount equal to one-half of the judgment. The Illinois Court of Appeals held that he could recover. In the case of Hall v. Ayer, 19 How. Prac. 91, the parties agreed to settle by releasing claims against each other and the plaintiff gave the defendant a consent that the judgment be satisfied on payment of costs, and it appeared that the judgment was entered up without costs, but the plaintiff had agreed with his attorney that his compensation should be $200 out of the amount re-

covered. The court held that the defendant was bound to pay what the attorney was entitled to under the agreement—$200—as the terms of the settlement were equivalent to notice, and sufficient to put him on inquiry as to the amount of the costs. Hall v. Ayer, 19 How. Prac. 91, 9 Abb. Prac. 220.

The only case which seems to radically and diametrically oppose the exception to the general rule thus announced is that of Whittaker v. Clarke, 33 Tex. 643. In that case, which was a suit on a due bill, defendant pleaded that since the institution of the suit he had fully paid plaintiff the debt sued on, and he filed plaintiff's receipt as part of his plea. Plaintiff's attorney filed a plea of intervention, asserting that he had a lien on the debt for his fees; that the debt had been settled by plaintiff and defendant without his knowledge or consent, and in fraud of his rights; and that he was entitled to judgment against defendant for his fees. The court held that defendant's demurrer to the plea should have been sustained, the court declaring the law to be that a defendant is in no way responsible to plaintiff's attorney for his fees, and may adjust the demand with the plaintiff himself, pending the suit, regardless of the attorney's fee, and the lien which the attorney was entitled to upon his client's papers and money when in his possession.

The correct rule, however, in such cases is that a defendant's attorney, knowing of the plaintiff's attorney's interest in the claim, takes the consequences of a settlement made without notifying him, protecting his rights, or obtaining his concurrence. Eberhardt v. Schuster, 10 Abb. N. C. (N. Y.) 374.

JETSAM AND FLOTSAM.

LIABILITY OF EMPLOYER FOR INJURIES TO THIRD PARTIES CAUSED BY NEGLIGENCE OF INDEPENDENT CONTRACTOR IN RESPECT OF PREMISES UPON WHICH THE PUBLIC ARE INVITED UPON PAYMENT OF A FEE.*

The general law that there is no liability upon the employer for the negligence of an independent contractor is well settled. The general principle may be stated thus: When an individual or corporation contracts with another individual or corporation exercising an independent employment for the latter to perform a work, not a nuisance *per se*, or in itself unlawful, or likely to cause harm to others, such work to be done according to the contractor's own methods, and not subject to the employer's control as to the manner in which it is to be done, but only as to the results to be obtained, the employer is not liable to a third person for injury to such third person caused by the negligence of an independent contractor. See note to Covington, etc., Bridge Co. v. Steinbrock, 76 Am. St. Rep. 382, 385 (1899). Moreover, it may be said that whenever circumstances impose a duty upon the employer he cannot escape liability by employing an independent contractor. Thus, in Texas State Fair v. Brittain, 118 Fed. Rep. 713 (1902), and Texas State Fair v. Marti, 69 S. W. Rep. 432 (1902), both cases being founded upon the same cause of action,—the State Fair Association under a contract with Smith and Lucas, in return for a portion of the receipts, gave them the exclusive use of a part of the fair grounds for exhibition purposes, and advertised this exhibition as one of the attractions of the fair. The seating capacity provided by the state fair proving inadequate, Smith and Lucas erected other seats. Owing to some negligence in their construction these last-mentioned seats fell, injuring Brittain, the defendant in error. The state fair sought to avoid liability on the ground that Brittain's injuries, if caused by the negligence of any one, were caused by the negligence of Smith and Lucas, who were independent contractors, and not its agents, and for whose acts it was in no way responsible. But the court held that no matter by whom the seats were erected, it was the duty of the state fair to see that the same were in a reasonably safe condition before inviting the public to occupy them. "Under the circumstances," said the court, "it was the duty of the plaintiff (in error) to exercise ordinary care to prevent injury to those attending the entertainment. This is certainly true regarding the safety of the premises." 69 S. W. Rep. 433. To the same effect is the case of Richmond, etc., Ry. Co. v. Moore, 94 Va. 493 (1897). The rule laid down by Cooley is made the basis of the decision: * * * "when one expressly or by implication invites others to come upon his premises, whether for business or any other purpose, it is his duty to be reasonably sure he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit." Cooley on Torts, 2d Ed., p. 718. Thus it will be observed that it is negligence—the failure to perform a duty—that renders the state fair liable. And, indeed, in all cases of this kind, if the injury be caused by the independent contractor's negligence, the responsibility for this negligence falls upon the employer, who is himself negligent, either for permitting an act to be done which may result in injury unless proper precautions are taken and failing to take such precautions, or for accepting work done in a defective manner without ascertaining whether it is reasonably fit for the purpose for which it is to be used.

In Francis v. Cockrell, L. R. 5 Q. B. 501 (1870), where defendant sold to plaintiff a seat on a grand stand for the purpose of viewing a steeple-chase, and owing to the negligent construction of the stand it collapsed and injured plaintiff, it was said that there was an implied contract on the part of the defendant that the stand was reasonably fit for the purpose for which it was to be used. The court said: "One who lets for hire, or engages for the supply of any article or thing, whether it be a carriage to be ridden in, or a bridge to be passed over (Grote v. Chester and Holyhead Ry. Co., 2 Exch. 251, 1848), or a stand from which to view a steeple-chase, or a place to be sat in by anybody who is to witness a spectacle for a pecuniary consideration, does warrant, and does impliedly contract, that the article or thing is reasonably fit for the purpose to which it is to be applied, subject, however, to this important qualification: He does not contract against any unseen or unknown defect which cannot be discovered, or which may be said to be undiscoverable by any ordinary or reasonable means of inquiry or examination. Readhead v. Midland Ry. Co., 20 L. T. Rep. (N. S.) 628, 1867, per Kelly, C. B. Yet even in this case the idea that there was a duty incumbent upon the employer was present, for Martin, B., points out that there existed between the plaintiff and the defendant "one of those implied contracts which, in point of fact, is the same as a duty." The duty was personal on the defendant when he received the admission fee to provide that the stand was ordinarily fit and proper for the purpose for which it was to be

*Texas State Fair v. Brittain, 118 Fed. Rep. 713 (1902).

used. So also in Pike v. The Polytechnic Institution, 1 F. and F. 712 (1859).

In general it may be said that persons managing an exhibition are under just the same obligation with respect to making their premises safe as are other owners of real property. The proprietor of a hall to which the public are invited is bound to use ordinary care and diligence to put and keep the hall in a reasonably safe condition for persons attending in pursuance of such invitation, and if he neglects his duty in this respect so that the hall is unsafe, his knowledge or ignorance of the defect is immaterial. Currier v. Boston Music Hall, 135 Mass. 413 (1883). If an owner or occupier of land directly or impliedly induces persons to come upon his premises, he thereby assumes an obligation that the premises are in a reasonably safe condition, so that persons there by his invitation shall not be injured by them or in their use for the purpose for which the invitation was extended. Hart v. Washington Park Club, 157 Ill. 9 (1895). "A person erecting and maintaining a hall for exhibition purposes must use reasonable care in the construction, maintenance, and management of it, having regard to the character of the exhibitions to be given and the customary conduct of the spectators who witness them." Schofield v. Wood, 170 Mass. 415 (1898). But on the lease of a building for exhibition purposes, the gallery being designed only for a limited number of spectators, there is no implied warranty that they shall be safe from a turbulent crowd. It is safe only for ordinary uses. "If any responsibility attaches to the defendant," said the court, "it cannot be based upon any contract obligation, but must rest entirely upon its *delictum*." Edwards v. N. Y. and Harlem Ry. Co., 98 N. Y. 245, 248 (1885).

The doctrine that when one invites another upon his premises he impliedly warrants that they are reasonably safe was followed in Fox v. Buffalo Park, 21 N. Y. App. Div. 321 (1897), where it was said: "While it is undoubtedly true in ordinary cases in the leasing of buildings that there is no implied warranty on the part of the lessor that the buildings are fit and safe for the purposes for which they are leased, the rule is different in regard to buildings and structures in which public entertainments and exhibitions are designed to be given and for admissions to which the lessors directly or indirectly receive compensation. In such cases the lessors or owners of the buildings or structures hold out to the public that the structures are reasonably safe for the purposes for which they are let or used, and impliedly undertake that due care has been exercised in the erection of the buildings." Francis v. Cockrell, L. R. 5 Q. B. 501 (1870); Swords v. Edgar, 59 N. Y. 28 (1874); Camp v. Wood, 76 N. Y. 92 (1879); Beck v. Carter, 68 N. Y. 283 (1877); Grote v. C. and H. R. Co., 2 Exch. 251 (1848); Campbell v. Portland Sugar Co., 62 Me. 552 (1871); Wendell v. Baxter, 12 Gray, 494 (1859).

Having stated the duties of the employer with respect to the condition of his premises, we have now to inquire when he has been held liable for injuries to a person caused by the negligence of an independent contractor who is conducting an exhibition on the employer's grounds. One who employs an independent contractor to make and conduct an exhibition is not relieved from responsibility to persons receiving injury if the exhibition is of a kind which will probably cause injury unless due precautions are taken to guard against harm. Thompson v. Lowell, etc., Street Ry. Co., 170 Mass. 577 (1898); Curtis v. Kiley, 153 Mass. 123 (1891); Richmond, etc., Ry. Co. v. Moore, 94 Va. 493 (1897); Hanver v. Whalen, 49 Ohio St. 209 (1892); Bower v. Pete, 1 Q. B. D. 32. In Richmond, etc., Ry. Co. v. Moore, *supra*, it is said: "It is immaterial whether the person giving the exhibition is an independent contractor or not. The gist of the action is the negligent failure of the defendant to use proper care to protect a visitor from a danger on its premises while there at the defendant's invitation." So also, in Conradt v. Clauve, 93 Ind. 476 (1883), and Sebeck v. Plattdeutsche Volksfest Verein, 64 N. J. L. 624 (1900). But in Smith v. Benick, 87 Md. 610 (1898), a different view is taken. It is there said that "when an owner or occupier of premises employs a competent person to do work which of itself is not a nuisance, or of which the necessary or probable consequence would not be to injure others, the employer is not responsible for such negligence as is entirely collateral to, and not a probable consequence of, the work contracted for," citing Deford v. State, 31 Md. 179; Suburban Co. v. Moores, 80 Md. 348; Randleson v. Murray, 8 Adol. Ell. 109; Davis v. Congregational Society, 129 Mass. 367; Pickard v. Smith, 10 C. B. (N. S.) 468. And in Deyo v. Kingston Consolidated Ry. Co., 88 N. Y. Supp. 487 (1904), where the defendant invited the public to its park to witness an exhibition given by an independent contractor, and the plaintiff was injured by the negligent discharge of a rocket by one of the contractor's servants, it was held that the defendant was not liable, as he could not reasonably have been expected to foresee the independent contractor's negligence.

In conclusion, it may be said that apparently in all cases in which the employer has been held liable for the negligence of an independent contractor in respect of premises upon which the public are invited, there has been a duty cast upon the defendant by reason of the invitation to see that the premises are reasonably safe for the purposes for which the invitation has been extended.—*American Law Register.*

HUMOR OF THE LAW.

"I am so very unhappy, Mr. Brief," said the fair petitioner for a divorce, to her lawyer.

"Is their anything in particular wrong?" the legal gentleman asked, sympathetically.

"No, nothing in particular," sighed the fair petitioner. "I am simply miserably blue and depressed. But I suppose that is something for which you cannot advise."

"Well, madam," said the lawyer, swinging round in his chair. "I will say frankly that if you were a man I should advise you to go out and drink three or four cocktails. But, as it is, I am afraid I am not competent to deal with the situation."

Three or four days later the fair petitioner again called at the office of her lawyer. This time she was all smiles.

"And, oh, Mr. Brief," she said, when she arose to go, at the end of the conference, "I want to thank you very much for your advice as to how to get rid of the blues. Like all your other advice, it was excellent."

"You—you—" gasped the lawyer

"Yes," said the lady, "I took it.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ACKNOWLEDGMENT—Disqualification of Officer.—That an officer taking a buyer's acknowledgment to a contract of conditional sale was the selling agent of the seller did not disqualify him from taking such acknowledgment.—National Cash Register Co. v. Lesko, Conn., 58 Atl. Rep. 967.

2. ACKNOWLEDGMENT—Married Woman, Privy Examination.—Under Laws 1889, p. 383, ch. 389, married woman's privy examination held not subject to attack for fraud, duress, or undue influence.—March v. Griffin, N. Car., 48 S. E. Rep. 735.

3. ACTION—Personal Injuries.—A count at common law for negligence may be joined with counts under the employers' liability act, Code 1896, § 1749.—Sloss Iron & Steel Co. v. Tilson, Ala., 37 So. Rep. 427.

. ADOPTION—Rights of Child Under Contract to Adopt.—Complainant held not entitled to recover the property of her foster parents as their alleged heir under a contract to adopt.—Bowins v. English, Mich., 101 N. W. Rep. 204.

5. APPEAL AND ERROR—Action Necessary to Perfect.—An appeal is perfected by giving security for costs within the 10 days after judgment allowed for taking an appeal by Code 1896, § 3437; no written application being necessary.—State v. United States Endowment & Trust Co., Ala., 37 So. Rep. 442.

6. APPEAL AND ERROR—Alimony Pendente Lite.—An appeal lies from an order granting alimony *pendente lite*.—Barker v. Barker, N. Car., 48 S. E. Rep. 733.

7. APPEAL AND ERROR—Authentication of Bill of Exception.—A clerk's certificate to the record in a cause cannot authenticate a bill of exceptions which was not signed by the judge until after such certificate was made.—Nurrenbern v. Daniels, Ind., 71 N. E. Rep. 889.

8. APPEAL AND ERROR—Judgment on Pleadings.—Where a motion for judgment on the pleadings is sustained, and judgment rendered for one of the parties, the other may appeal without motion for a new trial.—Dunn v. Claunch, Okla., 78 Pac. Rep. 388.

9. APPEARANCE—Jurisdiction.—Where defendant voluntarily appears, files a demurrer, and participates in the trial to the court, it has jurisdiction, though no summons was issued.—Whitaker v. Hughes, Okla., 78 Pac. Rep. 83.

10. APPEAL AND ERROR—Special Appearance.—The entry of a special appearance does not authorize counsel so appearing to appeal from a default judgment against his client.—Houston v. Greensboro Lumber Co., N. Car., 48 S. E. Rep. 738.

11. APPEAL AND ERROR—Sufficiency of Pleadings as to Alimony.—In an action for divorce, the sufficiency of the pleadings as to alimony cannot be reviewed on appeal from the judgment, in the absence of a bill of exceptions or case.—Conklin v. Conklin, Minn., 101 N. W. Rep. 70.

12. APPEAL AND ERROR—Time for Taking Appeal.—Where an appeal was taken within six months of a judgment *nunc pro tunc*, it was immaterial that more than six months had expired since the return of the verdict and the date as of which the judgment was so entered.—Stutsman v. Sharpless, Iowa, 101 N. W. Rep. 105.

13. APPEAL AND ERROR—Waiver by Joinder in Error.—The joinder in error of an appellee is a waiver of the failure of the appellant to file an appeal bond, but not of objections to jurisdiction.—Canaday v. Yager, Ind., 71 N. E. Rep. 977.

14. ASSIGNMENTS FOR BENEFIT OF CREDITORS—Construction of Trust Deed.—A trust deed from an insolvent of all his property held a common-law assignment, and valid between the parties and subsequent purchasers with notice.—Lucy v. Freeman, Minn., 101 N. W. Rep. 167.

15. BANKRUPTCY—Assignment of Claim for Death by Wrongful Act.—A parol assignment of a husband's claim for the wrongful killing of his son to his wife, in consideration of money advanced for funeral expenses etc., held valid, as against his trustee in bankruptcy, to the extent it secured the amount expended.—*In re* Burnstine, U. S. D. C., E. D. Mich., 131 Fed. Rep. 828.

18. BANKS AND BANKING—Ownership of Savings Account.—Money in savings bank accounts held not that of decedent for which his administratrix was liable.—*In re* Finn's Estate, 90 N. Y. Supp. 159.

19. BANKS AND BANKING—Suspension, Interest on Deposits.—On suspension of bank, deposits draw interest at 7 per cent.—*Ex parte* Stockman, S. Car., 48 S. E. Rep. 736.

20. BILLS AND NOTES—Suit in Equity to Cancel Check.—Suit in equity to cancel check given in payment of taxes on ground of mistake held not maintainable.—*In re* Morgan's Estate, Iowa, 101 N. W. Rep. 127.

21. BRIBERY—Authority to Act Officially.—Where a waterworks contract might come before a city council for official action, that the council had no authority to make the contract did not prevent the payment of money to councilmen to influence their action from constituting a violation of Comp. Laws, § 11,312.—People v. Ellen, Mich., 100 N. W. Rep. 1008.

22 BRIDGES—Defect in Bridge Causing Injury to Bicyclist.—In an action for injuries to a bicycle rider by riding off the approach to a bridge, plaintiff's contributory negligence held a question for the jury.—Spring v. Inhabitants of Williamstown, Mass., 71 N. E. Rep. 949.

23. BROKERS—Commissions.—Where defendant employed plaintiff to sell certain land, and a contract was signed by the parties, but defendant's wife refused to sign the deed, plaintiff was entitled to his agreed compensation.—Marlin v. Sipprell, Minn., 101 N. W. Rep. 169.

24. BROKERS—Unauthorized Contracts.—Failure of a principal to communicate with a person with whom the agent entered into a contract exceeding the latter's authority held not a ratification.—Strong v. Ross, Ind., 71 N. E. Rep. 918.

25. BUILDING AND LOAN ASSOCIATION—Foreclosure of Mortgage.—On the foreclosure of a mortgage given by a member to a building association because of the latter's insolvency, the mortgagor is entitled to have the amount of premiums paid by him deducted from the amount due on the mortgage.—Harris v. Nevins, N. J., 59 Atl. Rep. 1051.

27. CARRIERS—Injury to Infirm Passenger.—In action by passenger against street railroad for injuries sustained by fall from a car, charge to the effect that defendant's servants owed a greater degree of care to aged and infirm persons than to persons in good health and full vigor held erroneous, as misleading and outside the issues.—Indianapolis & G. Rapid Transit Co. v. Derry, Ind., 71 N. E. Rep. 912.

28. CARRIERS—Passenger Injured by Strike Sympathizers.—A street car company held not liable for injuries to a passenger from stones thrown by strike sympathizers. — Bosworth v. Union R. Co., R. I., 58 Atl. Rep. 982.

29. CHARITIES—Cy Pres Doctrine.—The *cy pres* doctrine held to have no application to a bequest of the remainder of testatrix's estate to the "Universalist Japan Mission Fund," for the support of the Univeralist Mission in Japan.—Cook v. Universalist General Convention, Mich., 101 N. W. Rep. 217.

30. CHATTEL MORTGAGES—Agency.—A chattel mortgagor is not the agent of the mortgagee, so as to bind the latter by representations in obtaining a loan of another by mortgage on the same property. — Citizen's State Bank of Oakland v. Smith, Iowa, 101 N. W. Rep. 172.

31. COMPROMISE AND SETTLEMENT—Enforceability of Agreement to Release Damages.—Under an agreement to release certain damages if defendant should pay a certain annual sum, no action was maintainable to recover such payments.—Andrews v. Wellington, N. Car., 48 S. E. Rep. 732.

32. COMPROMISE AND SETTLEMENT — Subsequent Indebtedness on Contingent Claim.—Settlement of a cashier with bank held not to include a contingent claim of he cashier against the bank.—Berner v. German State Bank, Iowa, 101 N. W. Rep. 156.

33. CONSTITUTIONAL LAW—Railroad Tax Assessment. Comp. St. 1901, ch. 77, art. 1, §§ 39, 40, relating to taxation and assessment of railroad property, are not unconstitutional as depriving any person of property without due process of law.—Chicago, B. & Q. R. R. v. Richardson County, Neb., 100 N. W. Rep. 950.

34. CONSTITUTIONAL LAW—Redemption of Land Sold for Taxes.—St. 1902, p. 357, ch. 443, providing for the redemption of land sold for taxes, held not unconstitutional as impairing vested or contractual rights as against a purchaser of land sold after its passage for taxes assessed prior thereto.—Rogers v. Nichols, Mass., 71 N. E. Rep. 950.

35. CONSTITUTIONAL LAW—Sentence, Good Behavior and Ex Post Facto Law. Right to diminution of sentence by good conduct cannot be taken away by act passed after offense was committed.—People v. Johnson, 90 N. Y. Supp. 134.

36. CONSTITUTIONAL LAW—Taxation.—The owner is not deprived of his property without due process of law by means of taxation, if he has an opportunity to question its validity or the amount of such tax at some stage of the proceedings.—Hacker v. Howe, Neb., 101 N. W. Rep. 255.

37. CONTRACTS—Negligent Work, a Set Off.—In an action for work and labor, damages caused by negligent work held a proper set-off.—Electric Supply & Maintenence Co. v. Conway Electric Light and Power Co., Mass., 71 N. E. Rep. 983.

38. CONTRACTS—Street Lighting.—Complainant, though having a valid contract for street lighting with a city when it repudiated the same, held not entitled to enjoin the city from making contract with another.—Riker v. Oakland Circuit Judge, Mich., 101 N. W. Rep. 229.

39. CORPORATIONS—Forfeiture of Charter.—A court has a discretion as to declaring a forfeiture of the charter of a corporation for an act or omission which is not expressly made a ground of forfeiture by the charter.—State v. United States Endowment & Trust Co. Ala., 37 So. Rep. 442.

40. COSTS—Party Intervening and Dismissing.—A party who has voluntarily intervened, and afterwards dismissed his petition of intervention, is not thereafter within the jurisdiction of the court.—Guinn v. Iowa & St. L. R. Co., Iowa, 101 N. W. Rep. 94.

41. COSTS—Suing in Forma Pauperis.—An administrator held entitled, under Code § 210, to sue in *forma paurperis*.—Christian v. Atlantic & N. C. R. Co., N. Car. 48 S. E. Rep. 743.

42. COUNTIES—Railroad Aid Bonds.—A proposition to vote railroad aid bonds, otherwise in due form, is not void because authorizing the county to accept capital stock of the company.—Colburn v. McDonald, Neb., 100 N. W Rep. 961.

43. CRIMINAL EVIDENCE — Res Jestae.—A statement made by a defendant charged with murder, within a minute or two after the shooting and in the immediate vicinity, held admissible as a part of the *res gestae*.—Ferguson v. State, Ala , 37 So. Rep. 448.

44. CRIMINAL LAW—Indeterminate Sentence.—Under Pub. Acts 1903, p. 168, No. 136, § 1, providing for the imposition of indeterminate sentences, a sentence for "the maximum and minimum period of five years" is for a definite period, and improper.—*In re* Cummins, Mich., 100 N. W. Rep. 1008.

45. CRIMINAL TRIAL — Failure of Trial Court to File Opinion.—A decree held not void for failure of the court to file an opinion within six months after the cause was finally submitted, as required by Comp. Laws 1897, § 558. —Hoste v. Dalton, Mich., 100 N. W. Rep. 750.

46. CRIMINAL TRIAL—Objection to Private Counsel for State.—An objection to the appearance of private counsel to assist the county attorney must be supported by some showing that the county attorney did not request or require any assistance.—Blair v. State, Neb., 101 N. W. Rep. 17.

47. CRIMINAL TRIAL.—Rape, Declarations of Prosecutrix.—Declarations of prosecutrix, made when defendant was brought before her, that he was her assailant, held not admissible.—State v. Egbert, Iowa, 101 N. W. Rep. 191.

48. DEATH—Negligence of Parent.—In an action by a parent to recover for the wrongful killing of his son, the contributory negligence of the parent is a defense.—Indianapolis St. Ry. Co. v. Antrobus, Ind., 71 N. E. Rep. 971.

49. DEATH—Wrongful Death of Wife.—A husband is not entitled to recover against a railroad company for the instant killing of his wife, in the absence of statute permitting such recovery.—Seney v. Chicago, M. & St. P. Ry. Co., Iowa, 101 N. W. Rep. 76.

50. DEEDS—Rule in Shelley's Case.—A conveyance to a grantee for life, and at her death to her children or to their lineal descendants, did not convey a fee to the grantee under the rule in Shelley's case.—Brown v. Brown, Iowa, 101 N. W. Rep. 81.

51. DESCENT AND DISTRIBUTION—Contest to Establish Heirship.—In a contest to establish heirship and have distribution, the administrator is not an adverse party to any of the claimants.—Sorensen v. Sorensen, Neb , 100 N. W. Rep. 930.

52. DISMISSAL AND NONSUIT — Discontinuance Where Obtained by Fraud.—Where a discontinuance was obtained fraudulently, the court could set the same aside on motion.—Thompson v. Bay Circuit Judge, Mich., 101 N. W. Rep. 61.

53. DIVORCE—Application to Vacate Decree.—An application to vacate a decree of divorce is addressed largely to the sound discretion of the court.—Scribner v. Scribner, Minn , 101 N. W. Rep. 163.

54. DIVORCE—Alimony Pendente Lite Though in Jail. —Wife, confined in jail by her husband, and without funds, held entitled to alimony and suit money, pending suit for divorce by him.—Harmon v. Harmon, Dela., 58 Atl. Rep. 1042.

55. ELECTIONS—Admissibility of Ballot.—A stamp or cross placed on a ballot in the blank opposite the words

"No nomination" is a special mark, which renders the ballot invalid.—McCardle v. Barstow, Cal., 78 Pac. Rep. 371.

56. ELECTIONS—Factional Disputes.—It was competent for the legislature, authorizing an official ballot, to subject the right to a place thereon in case of a controversy to the decision of a party tribunal, as provided by Rev. St. 1898, § 85.—State v. Houser, Wis., 100 N. W. Rep. 964.

57. ELECTIONS—Nominees, Official Ballots.—Nominees certified as the candidates of a political party by another than the regular convention held entitled to no place on the official ballot.—State v. Metcalf, S. Dak., 100 N. W. Rep. 923.

58. EMINENT DOMAIN—Railroad Right of Way.—In a proceeding to assess the damages for land appropriated for a right of way, an instruction relative to the railroad company's liability for improperly making a cut held erroneous.—Guinn v. Iowa & St. L. R. Co., Iowa, 101 N. W. Rep. 94.

59. EQUITY—Laches.—In the absence of extraordinary circumstances, laches is inapplicable to suits in equity within the limited time for analogous actions at law.—Brown v. Arnold, U. S. C. C. of App., Sixth Circuit, 131 Fed. Rep. 723.

60. EQUITY—Setting Aside Master's Report.—A report by a master in chancery, prepared by counsel for one of the parties without knowledge of the other, should be suppressed.—Fitchburg Steam Engine Co. v. Potter, Ill., 71 N. E. Rep. 933.

61. ESTATES — Union of Life Estate with Vested Remainder.—The union of the life estate, the vested remainder, and the reversion in a common grantee merges and destroys contingent remainders limited to persons who are not, and may never be, in being.—Archer v. Jacobs, Iowa, 101 N. W. Rep. 195.

62. ESTOPPEL — Limitations. — A railway company, claiming land under a federal railway land grant, held estopped from asserting its claim as against one in possession under a claim of title for over ten years.—Iowa Railroad Land Co. v. Fehring, Iowa, 101 N. W. Rep. 120.

63. ESTOPPEL — Real Estate Broker's Action for Commissions.—Where plaintiff and another sold land for defendant for a certain commission, plaintiff held estopped from asserting further rights under the contract.—Theobald v. Hopkins, Minn. 101 N. W. Rep. 170.

64. EVIDENCE—Action for Rent, Account Books.—In an action for rent, plaintiff's account book, showing to whom he credited payments of rent, was inadmissible.—Cooley v. Collins, Mass., 71 N. E. Rep. 979.

65. EVIDENCE — Competency, Showing Habit. — Evidence of plaintiff's habit to ride her bicycle on the sidewalk near where she was injured while riding it held competent to show she was on the sidewalk at such time.—Kenney v. Town of Hampton, N. H., 58 Atl. Rep. 1046.

66. EVIDENCE—Judicial Notice of Election Usages and Customs.—Customs and usages governing the creation and existence of political parties held to be taken judicial notice of.—State v. Metcalf, S. Dak., 100 N. W. Rep. 923.

67. EVIDENCE—Rights of Wife as Tenant by Entirety.—A wife and husband cannot, by verbal agreement, change the effect of a deed creating in them a tenancy by the entirety, so as to entitle the wife to a share of the crops raised on the premises.—Morrill v. Morrill, Mich., 101 N. W. Rep. 209.

68. EVIDENCE — Testamentary Capacity. — Nonexpert witnesses on an issue of testamentary capacity can give an opinion that the testator was of unsound mind.—Stutsman v. Sharpless, Iowa, 101 N. W. Rep. 105.

69. EXECUTORS AND ADMINISTRATORS — Ancillary and Domiciliary.—Court of state where ancillary administrator was appointed held to have no jurisdiction of domiciliary administrator, as such, so as to determine his official responsibilities and duties.—Egan v. Wirth, R. I., 58 Atl. Rep. 987.

70. FEDERAL COURTS — Effect of State Decisions.—The opinion of a state court of last resort, construing a state statute, is conclusive on the federal court sitting in such state to the extent only of the precise question decided.—Southern Ry. Co. v. Simpson, U. S. C. C. of App., Sixth Circuit, 131 Fed. Rep. 705.

71. FINES — Subsequent Acquisition of Former Homestead.—Vendor of homestead, on subsequently acquiring title, held to take it subject to judgment for a fine existing at the time of the first conveyance.—Jasper County v. Sparham, Iowa. 101 N. W. Rep. 134.

72. FIRE INSURANCE—Authority of Agent to Waive Policy Provision.—An agent of a foreign insurance company held to have authority to waive a condition of the policy that an incumbrance on the property should render the policy void.—German-American Ins. Co. v. Yeagley, Ind., 71 N. E. Rep. 897.

73. FIRE INSURANCE — Dwelling House, Change of Occupancy.—The finding of a jury that an alleged change of occupancy of insured premises did not increase the hazard, held supported by the evidence.—Nicholas v. Iowa Merchants' Mut. Ins. Co., Iowa, 101 N. W. Rep. 115.

74. FIRE INSURANCE—Transfer of Title.—The question of whether title to goods had passed, within the meaning of a clause of an insurance policy stipulating a forfeiture in case of change of title, held one for the jury.—Richardson v. Insurance Co. of North America, N. Car., 48 S. E. Rep. 733.

75. FORCIBLE ENTRY AND DETAINER—Injunction.—An injunction to restrain defendants from interfering with the use of certain land by plaintiff may be pleaded in bar of an action of forcible entry and detainer.—Lowry v. Mitchell, Okla., 78 Pac. Rep. 379.

76. FRAUDS, STATUTE OF—Oral Lease, Term Beginning in Future.—Oral lease of real estate for one year for a term beginning a day or two in the future held valid, under Rev. Civ. Code 1903, § 1288, subd. 5.—Paulton v. Kreiser, S. Dak., 101 N. W. Rep. 46.

77. FRAUDULENT CONVEYANCES—Chattel Mortgages.—Where a mortgagee of chattels seizes the mortgaged chattels in the hands of a third person claiming to be the owner, such mortgagee must show that it became an incumbrancer in good faith subsequent to the fraudulent transfer.—First Nat. Bank v. Yeoman, Okla., 78 Pac. Rep. 388.

78. FRAUDULENT CONVEYANCES—Payment of Debts — A conveyance by debtor to pay debt of himself and wife, created by purchase of estate in entirety, held fraudulent as against creditors.—Caswell v. Pilkinton, Mich., 101 N. W. Rep. 212.

79. GIFTS—Delivery, Causa Mortis.—Where a gift *causa mortis* was made and accepted in good faith, formal delivery was unnecessary, where the property was already in possession of the donee.—Davis v. Kuck, Minn., 101 N. W. Rep. 165.

80. HABEAS CORPUS—Right to Petition.—A husband or wife of a person illegally restrained of his liberty is a proper person to petition for a writ of *habeas corpus*.—*Ex parte* Chace, R. I., 58 Atl. Rep. 978.

81. HOMESTEAD—Ejectment.—Defendant in ejectment, held estopped to say conveyance of homestead involved was without consideration and void.—Jasper County v. Sparham, Iowa, 101 N. W. Rep. 134.

82. HOMESTEAD—Vacant Lot.—Occupancy of a vacant lot held not sufficient to entitle the owner to claim it as a homestead.—Ware v. Hall, Mich., 101 N. W. Rep. 47.

83. HOMICIDE—Degree of Force Allowable in Arresting for Misdemeanor.—An officer is not entitled to exert force to the extent of taking human life in effecting an arrest for a misdemeanor or in preventing an escape or rescue from such arrest.—State v. Smith, Iowa, 101 N. W. Rep. 110.

84. HOMICIDE—Self-Defense.—Where, in a prosecution for homicide, defendant as a legal conclusion was the aggressor, instructions on the doctrine of self-defense were properly refused.—Burton v. State, Ala., 37 So. Rep. 435.

85. HUSBAND AND WIFE — Condoning Wife's Infidelity.—By continuing to live with his wife after knowledge of her infidelity, plaintiff condoned her offense, but not the offense of defendant.—Smith v. Hockenberry, Mich. 101 N. W. Rep. 207.

86. HUSBAND AND WIFE—Wife's Liability for Materials Furnished —Married woman held liable for materials furnished for construction of houses on her land, though contract was with her husband and the price charged to him by the seller.—Popp v Connery, Mich. 101 N. W. Rep. 54.

87. INJUNCTION — Action on Injunction Bond.—Only necessary costs and expenses, incurred in procuring the dissolution of an injunction, when injunction is the only remedy sought, are recoverable in an action on the injunction bond.—Williams v. Ballinger, Iowa, 101 N. W. Rep. 139.

88. INTEREST—Liquidated Damages — Where a contract stipulates an amount as liquidated damages for its breach, interest runs from the time when the right of action accrues.—Chicago & S. E. Ry. Co. v. McEwen, Ind., 71 N. E. Rep. 926.

89. INTERNAL REVENUE — Stamps on Packages of Liquor —In a proceeding to forfeit certain liquors for failure to properly stamp the same, the fact that the stamps indicated that the barrels contained more liquor than was actually placed therein held no defense.—United States v. Seven Barrels of Whisky, U. S. D. C., D. Neb., 131 Fed. Rep. 806.

90. INTOXICATING LIQUORS—Grant of Liquor License. A final order by a district judge on appeal from an order of a village board granting a liquor contract is not reviewable by appeal to the supreme court.—Halverstadt v. Berger, Neb., 100 N. W. Rep. 934.

91. INTOXICATING LIQUORS —Liability of Agent.—An agent employed by a licensed retailor of liquor to carry on the business is not liable to prosecution for selling without a license.—State v. Dudley, Ind., 71 N. E. Rep. 975.

92. JUDGES—Disqualification.—The common law rules as to the disqualification of judges give way to the rule of necessity, permitting one to act judicially, though disqualified otherwise, if, were he not to act there would be no tribunal to furnish a remedy for the case in hand.—State v. Houser, Wis., 100 N. W. Rep. 964.

93. JUDGMENT—Personal Service.—Judgment *In personam* cannot be rendered without personal service on defendant.—Korman v. Grand Lodge of the United States, 90 N. Y. Supp. 120.

94. JUDGMENT—Res Judicata.— A right or fact, distinctly put in issue and determined by a court of competent jurisdiction, cannot be disputed in a subsequent suit between the same parties.—Chicago, B. & Q. R. Co. v. Cass County, Neb., 101 N. W. Rep. 11.

95. JUDGMENT—Res Judicate. — A former judgment that certain property had been transferred to plaintiff's intestate in trust held *res judicata* as to the relations between the parties in a subsequent suit by plaintiff's intestate to recover for services rendered as to such property.—Hazard v. Coyle, R. I., 58 Atl. Rep. 987.

96. JUSTICES OF THE PEACE—Irregularities in Rendition of Judgment.—The failure to enter judgment on the return day in an action before a justice, where defendant fails to appear, is a mere irregularity not going to the jurisdiction of the court.—Tomlin v. Woods, Iowa, 101 N. W. Rep. 135.

97. LANDLORD AND TENANT School Lands, Right to Release.—Where a lessee of school lands under the lease of territory contracts with A to release said lands to him, his prior right to release said lands at the expiration of the original lease held to be relinquished to A.—Whitaker v. Hughes, Okla., 78 Pac. Rep. 385.

98. LICENSES—Corporations.— A corporation cannot avail itself of licenses issued to other corporations whose property it has bought.—Southern Car & Foundry Co. v. Calhoun County, Ala., 37 So. Rep. 425.

99. LIFE INSURANCE—Burden of Proving Suicide.—An insurer, defending an action on a life policy on the ground that the assured committed suicide, has the the burden of proving the fact of suicide.—Ross-Lewin v. Germania Life Ins. Co., Colo., 78 Pac. Rep. 805.

100. LIFE INSURANCE—Failure to Pay Premium.—A life policy held void under its terms, when insured dies after the second semiannual premium is due, and before it is paid.—Cayford v. Metropolitan Life Ins. Co., Cal., 78 Pac. Rep 258.

101. LIMITATION OF ACTIONS—Amendment of Pleading —Where the original petition in an action for conversion was defective, an amendment by the insertion of a necessary allegation held not to state a new cause of action, so as to permit limitations to be interposed.—Gourley v. Prokop, Neb., 100 N. W. Rep. 949.

102. LIMITATION OF ACTIONS—Relating to Beginning of Action.—Amendment to complaint held to present no new cause of action and to relate back to the commencement of the action, when the running of limitations against the cause of action ceased.—Patillo v. Allen-West Commission Co., U. S. C. C. of App., Eighth Circuit, 131 Fed. Rep. 680.

103. MANDAMUS—Pending Appeal by Taxpayer.—During an appeal by taxpayers from an allowance to a paving contractor by the city council, mandamus will not lie to compel the city comptroller to deliver a warrant for the claim.—Lobeck v. State, Neb., 101 N. W. Rep. 247.

104. MANDAMUS—Political Conventions.—In the absence of fraud, a candidate for a political office held not entitled to mandamus to control the acts of a political convention.—Jennings v. Board of Election Comrs. of Delta County, Mich., 100 N. W. Rep. 995.

105. MANDAMUS — To Prevent Discontinuance Being Stricken from Files.—Mandamus will not lie to compel the vacation of an order striking a stipulation of discontinuance from the files.—Thompson v. Bay Circuit Judge, Mich., 101 N. W. Rep. 61.

106. MARRIAGE—At Common Law.—An existing agreement to marry at a future day conclusively negatives the claim of a marriage *per verba de presenti* —Sorensen v. Sorensen, Neb., 100 N. W. Rep. 930.

107. MASTER AND SERVANT—Assumption of Risk.—The servant does not assume the risk of an injury caused by the master's negligence, where he had no knowledge of the existing danger.—Meehan v. Great Northern Ry. Co., N. Dak., 101 N. W. Rep. 183.

108. MASTER AND SERVANT—Defect in Track, Causing Death of Engineer.—In an action for the wrongful killing of an engineer by the derailment of his engine, the burden of proof that he knew of the defect causing the accident was on the defendant.—E. E. Jackson Lumber Co. v. Cunningham, Ala., 37 So. Rep. 445.

109. MASTER AND SERVANT—Emery Belt, Failure to Guard —An emery belt used in a factory to polish metal is a machine, within Burns' Ann. St. 1901, § 7087i, requiring machinery of every description in factories to be properly guarded.—La Porte Carriage Co. v. Sullender, Ind., 71 N. E. Rep. 922.

110. MASTER AND SERVANT — Fellow Servants. — The superintendent of a quarry and one engaged therein in breaking stone held not fellow servants.—Turrentine v. Wellington, N. Car., 48 S. E. Rep. 739.

111. MASTER AND SERVANT—Injury to Minor Servant. —A servant 14 years of age, employed to operate a stamping press, held to have assumed the risk of injury by having his fingers caught in the same.—Cohen v. Hamblin Russell Mfg. Co., Mass., 71 N. E. Rep. 948.

112 MASTER AND SERVANT—Injury to Seaman. — A steamer held liable for the injury of a seaman by reason of the giving way of a capstan, to which a hawser was made fast by order of the master while the vessel was being warped to a wharf, and which was wholly unfit to stand the strain put upon it, as the master knew.—The Westport, U. S. D. C., N. D. Cal., 131 Fed. Rep. 815.

113. MASTER AND SERVANT—Unguarded Machinery.—A mill owner held not guilty of negligence, justifying a recovery, by failure to provide a guard about machinery.—Chicago Veneer Co. v. Walden, Ky., 82 S. W. Rep. 294.

114. MINES AND MINERALS—Abandonment of Lease.—Failure of a grantee in a mining lease to make a *bona fide* search for minerals for 15 years after the execution of the lease held to entitle the lessor to treat the lease as abandoned.—Tennessee Oil, Gas & Mineral Co. v. Brown, U. S. C. C. of App., Sixth Circuit, 131 Fed. Rep. 696.

115. MINES AND MINERALS—Construction of Conveyance to Mine Coal.—A contract conveying coal underlying the owner's land, together with a part of the surface of the land, construed, and held not to authorize the grantee to use the shaft on the owner's land for the purpose of mining coal on land adjoining.—Moore v. Price, Iowa, 101 N. W. Rep. 91.

116. MONOPOLIES—Restraint of Trade.—An agreement, on the sale of a butchering business, not to purchase hogs or cattle within ten miles of the village in which the business was conducted within five years, held not unreasonable.—Espenson v. Koepke, Minn., 101 N. W. Rep. 168.

117. MORTGAGES—Sale, Application of Proceeds.—One holding land as security held not entitled to apply part of the proceeds of the sale of the land to the satisfaction of a debt other than that for which the land was originally pledged.—Berner v. German State Bank, Iowa, 101 N. W. Rep. 156.

118. MUNICIPAL CORPORATIONS—Appeal from Allowance on Paving Contract.—Where an appeal from the allowance of a partial estimate on a paving contract by the city council is perfected, it suspends the order of the council, and the city comptroller is not required to deliver the warrant to the claimant.—Lobeck v. State, Neb., 101 N. W. Rep. 247.

119. MUNICIPAL CORPORATIONS—Estoppel to Question Special Assessment.—Where a purchaser of land subject to an apparent lien of special assessments procures title by a conveyance reciting that it is subject to such assessments, which the purchaser assumes, he cannot sue to set aside the tax as invalid.—Eddy v. City of Omaha, Neb., 101 N. W. Rep. 25.

120. MUNICIPAL CORPORATIONS — Street Improvement, Special Agreement with Abutting Owners.—An agreement entered into between a city and owners abutting on a street, relating to the improvement of the street, held not inequitable, so as to authorize a general taxpayer to intervene.—Shelby v. City of Burlington, Iowa, 101 N. W. Rep. 101.

121. NEGLIGENCE—Burden of Showing Invitation —In an action for injuries to one on defendant's premises by invitation, the burden of showing the invitation is on plaintiff.—Sloss Iron & Steel Co. v. Tilson, Ala., 37 So. Rep. 427.

122. PARENT AND CHILD — Action by Parent, Criminal Assault.—An action will lie by a father to recover damages for criminal abuse of his minor child.—Nyman v. Lynde, Minn., 101 N. W. Rep. 163.

123. PARENT AND CHILD—Liability for Board of Child.—In an action against a father for board of his son, the burden was on the plaintiff to show that the son was authorized to procure board on his father's credit, and that plaintiff furnished the board relying upon the father's credit alone.—McCrady v. Pratt, Mich., 101 N. W. Rep. 227.

124. PARTIES — Substituted Parties.—Where a solicitor sued to recover money for the distributees of a decedent, an order directing that said distributees be made parties plaintiff was proper.—Brooks v. Holton, N. Car., 48 S. E. Rep. 737.

125. PARTNERSHIP — Deceased Partner's Interest.—Bonus secretly procured by widow and administrator of deceased partner for consenting to the sale of partnership property held to be a firm asset, and to be accounted for to the firm as such.—Comstock v. McDonald, Mich., 101 N. W. Rep. 55.

126. PARTNERSHIP — Surviving Partner —That a surviving partner is domiciliary administrator of his deceased partner does not prevent him from dealing individually with an ancillary administrator appointed in another state with respect to partnership property of the decedent.—Egan v. Wirth, R. I., 58 Atl. Rep. 987.

127. PUBLIC LANDS — Trespass, Cutting Timber and Replevin.—Where ties were cut from state lands by a trespasser, a purchaser from the trespasser before the ties were seized by the state acquired no title as against a purchaser from the state.—Raber v. Hyde, Mich., 101 N. W. Rep. 61.

128. REFERENCE—Counterclaim, Distinct Cause of Action.—Where, in an action on account, a reference is asked, it will be denied, where a counterclaim is interposed which sets up a distinct cause of action.—Price v. Parker, 90 N. Y. Supp. 98.

129. RELIGIOUS SOCIETIES — Rights of Members.—Under the constitution and by-laws of a church corporation, composed of two nationalities, held, that members of one nationality could use the church property for separate services, without application to the board of trustees.—Peterson v. Christianson, S. Dak., 101 N. W. Rep. 40.

130. REPLEVIN — Voluntary Surrender. — Where defendant in replevin did not voluntarily surrender the property to an officer who seized the same under another writ, he was not deprived of his interest in the property by such seizure, so as to preclude his right to appeal from an adverse judgment in a replevin suit.—Culver v. Randle, Oreg., 78 Pac. Rep. 394.

131. SALES—Ability of Seller to Furnish Goods.—Plaintiff, suing for breach of defendant's contract to purchase ties of him, held entitled to show that, though he did not have them, he could have obtained them.—Thick v. Detroit, U. & R. Ry. Co., Mich., 101 N. W. Rep. 64.

132. SALES—Part Performance. — One receiving goods in part performance of a contract of sale cannot, in action for price, plead breach of contract in bar.—Gibboney v. R. W. Wayne & Co., Ala., 37 So. Rep. 436.

133. SALES—Passing of Title.—Under a contract for the sale of onions, to be screened and weighed and paid for on a certain date, title held not to pass before these things were done.—Wesoloski v. Wysoski, Mass., 71 N. E. Rep. 982.

134. SALES—Thirty Days' Credit.—The price of articles sold under an agreement to furnish a contractor materials for several jobs on 30 days' time held due 30 days from the date of invoice of the articles in question.—People v. Grant, Mich., 100 N. W. Rep. 1006.

135. SALES—Time for Recording.—A contract or conditional sale, recorded the day after the property which was the subject thereof was received by the buyer, held recorded in time, within Gen. St. 1902, § 4864.—National Cash Register Co. v. Lesko, Conn., 58 Atl. Rep. 967.

136. SCHOOLS AND SCHOOL DISTRICTS — Action on Treasurer's Bond.—In an action on the bond of a school treasurer, a paragraph of defendant's answer alleging a special defense provable under defendant's general denial held demurrable.—Hornbeck v. State, Ind., 71 N. E. Rep. 916.

137. SET-OFF AND COUNTERCLAIM — Recoupment.—Where the damages sought to be recouped are sustained by defendants' alleged principals, strangers to the action, the plea of recoupment is subject to demurrer. — Gibboney v. R. W. Wayne & Co., Ala., 37 So. Rep. 456.

138. STATUTES — Validity of Consulting Legislative Journals to Ascertain Validity. — Legislative journals may be looked into to ascertain whether a law was properly enacted.—Colburn v. McDonald, Neb., 100 N. W. Rep. 961.

139. STREETS — Abandonment. — Nonuser of certain real estate in controversy as a street by the public for 14 years held not to constitute an abandonment of the public's rights therein as against persons who had not

changed their position to their prejudice by reason thereof.—Arnold v. Volkman, Wis., 101 N. W. Rep. 158.

140. STREET RAILROADS—Look and Listen —A pedestrian, who goes upon a street railroad track without looking or listening, held chargeable with contributory negligence.—Birmingham Ry., Light & Power Co. v. Oldham, Ala., 37 So. Rep. 452.

141. STREET RAILROADS— Personal Injury, Right to Use of Street.—Neither a street railroad company nor the driver of a vehicle is entitled to the exclusive use of that portion of the highway occupied by the tracks.—O'Brien v. Blue Hill St. Ry. Co., Mass., 71 N. E. Rep. 951.

142. TAXATION— Board of Equalization. — The State Board, in the equalization of assessments as between different counties, acts in a quasi judicial character, and the action taken is not subject to collateral attack, except for fraud or exercise of power not conferred by law.—Hacker v. Howe, Neb., 101 N. W. Rep. 255.

143. TAXATION—Foreign Insurance Company.—A tax on the gross amount of premiums received by a foreign fire insurance company during the preceding year is not a tax on property, within Const. art. 9, § 1, cl. 1, but is a tax on the insurance business, authorized by the second subdivision of said section.—Aachen & Munich Fire Insurance Co. v. City of Omaha, Neb., 101 N. W. Rep. 3.

144. TAXATION—Notice of Meeting of Board to Assess. —Where a statute names a time and place for the meeting of a board to assess taxes, personal notice is unnecessary.—Chicago, B.& Q. R. R. v. Richardson County, Neb., 100 N. W. Rep. 950.

145. TAXATION—Railroad Lands.— Land owned by a railroad, but in the possession and use of third persons under a license, held not exempt from taxation under Comp. Laws 1897, § 6277.—Grand Rapids & I. Ry. Co. v. City of Grand Rapids, Mich., 100 N. W. Rep. 1012.

146. TAXATION—Tax Sale of Land.—A tax deed issued by the state upon premises acquired by the state under a tax sale is void, if the amount paid therefor by the purchaser does not include the amount of the then due and delinquent subsequent tax.—Chadbourne v. Hartz, Minn., 101 N. W. Rep. 68.

147. TELEGRAPHS AND TELEPHONES—Right of Action of Addressee.—The addressee of a telegram can maintain an action for failure to deliver it only when it is for his benefit.—Frazier v. Western Union Tel. Co., Oreg., 78 Pac. Rep. 330.

148. TRIAL—Directing Verdict.—Where the evidence leaves material facts undisputed, and they are such that the court could give effect to but one verdict, it is its duty to direct the verdict.—Chicago Great Western Ry Co. v. Roddy, U. S. C. C. of App., Eighth Circuit, 131 Fed. Rep. 712.

149. TRIAL—Divorce, Allowance to Counsel.—Where an allowance to counsel in divorce is asked after a trial, the court may determine the matter from its own experience and the circumstances disclosed by the record. —Cochran v. Cochran, Minn , 101 N. W. Rep. 179.

150. TRUSTS—Conveyance by Trustee.—Conveyance by trustee to a creditor of both himself and his *cestuis que trustent* held to convey no title to the property held in trust —Berner v. German State Bank, Iowa, 101 N. W. Rep. 156.

151. TRUSTS—Invalid Provision.—Where a trust in testator's will is invalid, but the purpose of testator, so far as it is valid, can be carried out by expunging the trust and accellerating the estate in remainder, it will be done.—Lord v. Lord, 90 N. Y. Supp. 143.

152. TRUSTS—Trustee Ex Maleficio. — The case of a trust *ex maleficio* in land held not to be within the statute of frauds.—Kroll v. Coach, Oreg., 78 Pac. Rep. 397.

153. VENDOR AND PURCHASER—Bona Fide Purchase.— The concurrence of good faith, absence of notice, payment of value, and legal estate in the purchaser at one time costitutes a complete defense of a *bona fide* purchase.—United States v. Detroit Timber & Lumber Co., U. S. C. C. of App., Eighth Circuit, 131 Fed. Rep. 668.

151. TRUSTS—Invalid Provision.—Where a trust in tes—A church organization has not such title to its church property as equity would require a vendee to accept, in the absence of a conveyance to it from the trustees, to whom the property had originally been conveyed.—Methodist Episcopal Church at Bound Brook v. Roberson, N. J., 58 Atl. Rep. 1056.

155. WATERS AND WATER COURSES—Creamery Refuse. —Discharge of refuse from a creamery into a cesspool held not a nuisance.—Perry v. Howe Co-op. Creamery Co., Iowa, 101 N. W. Rep. 150.

156. WILLS—Bequest to Charities.—The "Universalist General Convention" held entitled to a fund bequeathed "to the Universalist Japan Mission Fund, for the support of the Universalist Mission in Japan."—Cook v. Universalist General Convention, Mich., 101 N. W. Rep. 217.

157. WILLS—Conditional Limitations.—A conditional limitation on a devise of a remainder held void for repugnancy.—Tarbell v. Smith, Iowa, 101 N. W. Rep. 118.

158. WILLS— Construction, Tenants in Common.— Beneficiaries of a trust held to take as tenants in common, and not as a class or as joint tenants, so that on the death of one the trust terminated as to his share.—Loomis v. Gorham, Mass., 71 N. E. Rep 981.

159. WILLS—Contest.—Failure of proponents in a will contest to appeal from an order admitting a former will to probate before judgment held not to preclude an appeal from such judgm nt after entry.—Stutsman v. Sharpless, Iowa, 101 N. W. Rep. 105.

160. WILLS—Remainder Limited on Life Estate.—Remainder limited on life estate held to vest at the same time as the life estate, and to be subject to alienation or the claims of creditors.—Archer v. Jacobs, Iowa, 101 N. W. Rep. 195.

161. WITNESSES — Credibility Affected by Impeachment.—Witness may be impeached, though impeaching evidence is without probative force as original evidence on the question at issue.—Hagen v. New York Cent. & H. R. R. Co., 90 N. Y Supp. 125.

162. WITNESSES—Disqualifying Interest in Suit Against Administrator.—Code 1896, § 1794, held not to disqualify the wife or son of the plaintiff, in an action against an administrator, from testifying to a contract between plaintiff and the decedent.—Meyers v. Meyers, Ala., 37 So. Rep. 451.

163. WITNESSES — Husband Against Wife.—A husband may testify in a criminal case against his wife concerning an assault upon his own person.—State v. Harris, Dela., 58 Atl. Rep. 1042.

164. WITNESSES—Impeaching Evidence.—A statement of witness out of court held not to conflict with her testimony, so as to be admissible as impeaching evidence.—Myers v. Manlove, Ind., 71 N. E. Rep. 893.

165. WITNESSES—Impeachment.—In a prosecution for homicide, a letter, the genuineness of which was not proved, held inadmissible to impeach a witness alleged to have written the same.—Burton v. State, Ala., 37 So. Rep. 435.

166. WITNESSES—Refreshing Memory from Memorandum.—Written memoranda may be referred to, to refresh the memory of a witness, and introduced in evidence to supply the details of what the witness has sworn.—First Nat. Bank v. Yeoman, Okla., 78 Pac. Rep. 388.

167. WITNESSES — Testimony of Wives Where Husbands are Jointly Indicted. — Where two defendants were jointly indicted and tried for the same offense, their wives were incompetent to testify in their favor.—State v. Sargood, Vt., 58 Atl. Rep. 971.

168. WITNESSES — Will Contest, Cross-examination.— In a will contest, no reference having been made to any conversation between witness and deceased on direct examination, it was error to permit her to be asked certain questions with reference thereto on cross-examination.—Stutsman v. Sharpless, Iowa, 101 N. W. Rep. 105.